Federal Court  Cour fédérale

**Date: 20180606**

**Dockets: T-1898-17**
**T-1899-17**
**T-1900-17**
**T-1901-17**

**Citation: 2018 FC 586**

**Toronto, Ontario, June 6, 2018**

**PRESENT: The Honourable Mr. Justice Diner**

**BETWEEN:**

**REEMI SALEM ASSLAFI**
**GAMAL SALEM ASSLAFI**
**SAMI SALEM SALEH ASSLAFI**
**BASHAR SALEM ASSLAFI**
**ABDULRUB NASSER ABDUL QAWI**
**AALSANAD**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

# JUDGMENT AND REASONS

## I. Overview

[1] By decision dated November 12, 2017 [the Decision], a visa officer in Abu Dhabi [Officer] refused four citizenship applications pertaining to four orphaned brothers. The brothers had sought citizenship on the basis that they were the adopted children of their uncle [the Principal Applicant], a Canadian citizen. However, the Officer was not satisfied that the purported adoptions had been in accordance with Canadian laws. As a result of the Officer's refusal, the four brothers and the Principal Applicant [together, the Applicants] have brought and consolidated four judicial review applications [the Applications] under section 22.1(1) of the *Citizenship Act*, RSC 1985, c C-29, which are now before me.

[2] In this somewhat unusual case, the Respondent agrees that the Decision should be set aside as a result of (a) conceded breaches of procedural fairness, and (b) important documentation missing from the Certified Tribunal Record [CTR]. Consequently, the Respondent requests that the matter be remitted for redetermination on a priority basis to a new officer.

[3] The Applicants sought the foregoing relief in their notices of application and leave memoranda. However, in their further consolidated memorandum, as well as at the hearing of the Applications, they took a different approach. In short, the Applicants now argue that this Court should either issue a directed verdict instructing the new visa officer to recognize the adoptions, or grant citizenship to the Applicant brothers outright. The Applicants also seek costs. The Respondent objects to these forms of relief.

[4] For the reasons that follow, I am allowing the Applications on the terms sought by the Respondent: the Decision will be set aside and sent back for redetermination on a priority basis, without costs.

## II. Preliminary Issue

[5] At the hearing of the Applications, the Court was informed by counsel for the Applicants that the Principal Applicant had prepared additional written submissions in reply to the Respondent's further consolidated memorandum. Applicants' counsel requested that this material be accepted by the Court for its consideration. The Respondent objected to this material, submitting that, pursuant to the order of this court dated April 30, 2018, the Applicants' further consolidated memorandum was due by May 7, 2018.

[6] I have not considered the additional written submissions prepared by the Principal Applicant. First, the Applicants have neither made their request under any provision of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22 or the *Federal Courts Rules*, SOR/98-106, nor have they provided me with any reason that written submissions submitted outside of the terms of my April 30, 2018 order should be accepted by this Court. In any event, I was advised by Applicants' counsel that the Principal Applicant's additional submissions spoke to the merits of the Decision under review. As I am satisfied that the Decision must be set aside on procedural grounds, these additional materials would have had no bearing on my analysis, had they been considered. Further, as I mentioned to the Principal Applicant and his counsel during the hearing, any relevant new or additional submissions contained in these materials could certainly be included when the matters are redetermined.

## III. Background

[7] On September 10, 2012, the Applicants made four Applications for Canadian Citizenship for a Person Adopted by a Canadian Citizen [the Citizenship Applications]. The Citizenship Applications were supported by a 2012 Yemeni judgment stating that the Principal Applicant's request to "adopt" the Applicant brothers had been granted [the 2012 Judgment].

[8] On October 29, 2014, an officer from the Immigration Section at the Embassy of Canada to United Arab Emirates in Abu Dhabi [Visa Office] wrote to the Applicants, expressing concern that section 5.1(1) of the *Citizenship Act* was not met, because Yemen follows Sharia law, which does not permit or recognize adoption — rather, orphaned children under Sharia law are cared for by way of "kafala", or guardianship. In brief, section 5.1(1) of the *Citizenship Act* states that the Minister of Citizenship and Immigration shall grant citizenship to any person who was adopted by a Canadian, where the adoption meets various criteria — including section 5.1(1)(c), which states that the adoption must have been in accordance with the laws of the place where it took place and the laws of the country of residence of the adopting citizen.

[9] In response to the officer's letter, the Applicants did not dispute that Yemen is subject to Sharia law. However, they argued, and continue to argue, that Canada ought to accept kafala as being in accordance with Canadian adoption laws for the purposes of section 5.1(1) (c) of the *Citizenship Act*, and the related sections of the *Citizenship Regulations*, SOR/93-246. The officer disagreed and found that the adoptions were not in accordance with Canada's adoption laws, refusing the Citizenship Applications on January 15, 2015.

[10] The Applicants filed applications for leave and judicial review in respect of the 2015 refusals. Those applications were settled by the parties, resulting in the discontinuance of the litigation and the matters being sent for redetermination by a different officer.

[11] The Citizenship Applications were then sent for determination by the Officer who authored the Decision now under review. On February 5, 2017, the Officer wrote a procedural fairness letter to the Applicants, again expressing concerns that the adoptions were not in accordance with the laws of Canada, because Yemen operates under Sharia law. The Applicants' response to this procedural fairness letter has been omitted from the CTR for an unknown reason. The Respondent submits that it has been unable to locate a copy of it for these Applications.

[12] On November 12, 2017, the Citizenship Applications were again refused, on the basis that the adoptions were not in accordance with the laws of Canada and did not meet the requirements of section 5.1(1) of the *Citizenship Act*.

[13] Again, the Applicants sought leave and judicial review, asking in their notices of application that the Decision be set aside and redetermined. Leave was not opposed, and this Judgment is the result.

[14] The Respondent notes in its further consolidated memorandum of argument that an offer of settlement was made to the Applicants. However, the parties were neither able to agree on the terms of settlement, nor on the appropriate remedy in a pre-hearing teleconference, or during further discussions that took place prior to the hearing of this judicial review.

## IV. Issues

[15] In this case, the Respondent submits, as mentioned above, that the merits of the Decision under review are irrelevant because the Respondent concedes the Decision to have involved a breach of procedural fairness. Specifically, the Respondent submits that the Officer, in rendering the Decision, inappropriately relied on extrinsic evidence with respect to Yemeni law without allowing the Applicants an opportunity to respond to that evidence. The Respondent also submits that it is not possible to determine the reasonableness of the Decision in any event, as the Applicants' response to the 2017 procedural fairness letter is missing from the CTR and cannot be located.

[16] The Respondent asks therefore that the relief sought in the Applicants' notices of applications be granted — namely, that the Decision be set aside and returned for redetermination by the Visa Office. The Respondent further asks that redetermination take place on a priority basis.

[17] At the hearing of the Applications, the Applicants agreed that the Decision involved procedural fairness deficiencies and had to be set aside. However, as set out in their further consolidated memorandum of argument, the Applicants also ask that "it be determined" that the brothers "were lawfully adopted within the Republic of Yemen", and that it be "ordered that they be granted Canadian citizenship". The Applicants alternatively submit that this Court should itself declare the Applicants to be citizens based on the evidence in the record.

[18] The Applicants also seek costs, in an amount to be determined by the Court, as a result of (a) the fact that the Applicants have needed to launch two sets of applications for judicial review (first in 2015, and the present application filed in 2017), and (b) the length of time between the two underlying 2015 and 2017 decisions.

[19] In response to the Applicants' request that this Court either issue a directed verdict or declare the Applicants to be citizens, the Respondent submits that the only viable recourse is for this Court to send the matter back to the Visa Office to be redetermined. The Respondent also disputes that costs are appropriate, noting that it has been diligent in attempting to remedy the situation — it did not oppose leave, attempted to settle, has admitted the reviewable errors in the Decision, and has asked that the matter be redetermined on a priority basis. Given the Respondent's concessions: there are only two issues before me: the appropriate remedy, and whether to order costs.

## V. Analysis

[20] I will not grant the relief requested by the Applicants in their further consolidated memorandum of argument, namely that this Court declare that:

> […] the four Applicant Sons were lawfully adopted within the Republic of Yemen, and that they are the Adopted Sons of the Canadian Applicant Father […], and further that it be ordered that they be granted Canadian Citizenship, permitting them then to travel to Canada as Canadian citizens in order to rejoin their Canadian Father and to reside with him and his extended family in Canada.

[21] The remedies permitted in an application for judicial review are set out in sections 18(1) and 18.1 of the *Federal Courts Act*, RSC, 1985, c F-7:

| | |
|---|---|
| 18 (1) Subject to section 28, the Federal Court has exclusive original jurisdiction | 18 (1) Sous réserve de l'article 28, la Cour fédérale a compétence exclusive, en première instance, pour : |
| (a) to issue an injunction, writ of certiorari, writ of prohibition, writ of mandamus or writ of quo warranto, or grant declaratory relief, against any federal board, commission or other tribunal; and | a) décerner une injonction, un bref de certiorari, de mandamus, de prohibition ou de quo warranto, ou pour rendre un jugement déclaratoire contre tout office fédéral; |
| (b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal. | b) connaître de toute demande de réparation de la nature visée par l'alinéa a), et notamment de toute procédure engagée contre le procureur général du Canada afin d'obtenir réparation de la part d'un office fédéral. |
| […] | […] |
| 18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought. | 18.1 (1) Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande. |
| (3) On an application for judicial review, the Federal Court may | (3) Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut : |
| (a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably | a) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière |

| | |
|---|---|
| delayed in doing; or | déraisonnable; |
| (b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal. | b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral. |

[22] Requests for directed decisions are rarely made, and even more rarely granted. The law in this area was recently summarized by Justice Boswell in *McIlvenna v Bank of Nova Scotia (Scotiabank)*, 2017 FC 699:

> [56] The authority of the Court to issue what amounts to a directed decision arises from the language of paragraph 18.1(3)(b) of the *Federal Courts Act*, which provides that the Court may on judicial review "…quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate… a decision, order, act or proceeding of a federal board, commission or other tribunal." It is generally recognized that the Court should exercise considerable restraint in issuing directions that amount to a directed decision, because it gives rise to concerns about the Court accomplishing indirectly what it is not authorized to do directly - namely, substituting its own decision for that made by the administrative decision-maker by compelling the decision-maker to reach a specific conclusion (see *Turanskaya v Canada (Minister of Citizenship and Immigration)*, [1995] FCJ No 1776 at para 6 (FC), 111 FTR 314 (aff'd [1997] FCJ No 254, 145 DLR (4th) 259). Furthermore, while directions the Court may issue when setting aside a tribunal's decision can include directions in the nature of a directed verdict, "this is an exceptional power that should be exercised only in the clearest of circumstances" *Rafuse v Canada (Pension Appeals Board)*, 2002 FCA 31 at para 14, 222 FTR 160 [*Rafuse*].

[23] The Federal Court of Appeal recently provided similar guidance in *Canada (Citizenship and Immigration) v Yansané*, 2017 FCA 48:

> [18] …We must never lose sight of the fact that such directions or instructions depart from the logic of a judicial review, and that their abusive or unjustified use would go against Parliament's desire to give specialized administrative organizations the responsibility for ruling on questions that often require expertise that common law panels are lacking. This is especially the case for eligibility and weighing of evidence, which are central to the mandate of administrative decision-makers.

[24] I further note that the circumstances before me are indistinguishable from *Gerges v Canada (Citizenship and Immigration)*, 2018 FC 106 [*Gerges*], in which Justice Gleeson, relying on *Ali v Canada (Minister of Employment and Immigration)*, [1994] 3 FCR 73 (Federal Court of Canada – Appeal Division), declined to order a directed outcome because there was information missing from the CTR:

> 21 *Ali* identifies the types of questions to be addressed when specific direction is being considered. One of those questions is whether the evidence on the record is clearly conclusive of only one possible outcome. This is not the case here. As was noted in oral submissions the documentation relied on in completing the CBSA assessment in 2015 is not included in the Certified Tribunal Record [CTR]. Any consideration of Mr. Gerges' submissions would require a review of this documentation. Without it, there is no basis upon which to conclude that there is only one possible outcome in this case.
>
> [Emphasis added.]

[25] There is another reason why a directed verdict is not appropriate. In my view, the matter before me turns on Yemeni law, the content of which is a question of fact and therefore reviewable on a reasonableness standard (see *Asad v Canada (Citizenship and Immigration)*, 2015 FCA 141 at paras 14-31). This is therefore essentially a fact-driven case, where key facts

regarding the "adoptions" are disputed, meaning that a directed verdict would be rare (*Canada (Minister of Human Resources Development) v Rafuse*, 2002 FCA 31 at para 14).

[26] Specifically, the Applicants here assert that the 2012 Judgment is determinative of the Citizenship Applications, and requires a grant of citizenship, principally relying on *Cheshenchuk v Canada (Citizenship and Immigration*), 2014 FC 33.

[27] The Respondent, on the other hand, asserts the opposite, relying in part on the analysis in *Mashooqullah v Canada (Citizenship and Immigration)*, 2014 FC 982. Therefore, the materials before me do not disclose only one possible outcome — not only because the record is incomplete, but also because the parties disagree on the reasonableness of the Officer's key factual findings. On this basis, I will not grant the relief sought in the Applicants' further consolidated memorandum.

[28] For similar reasons, neither will I order the alternative late-stage relief sought by the Applicants — namely, that this Court itself declare the Applicant brothers to be Canadian citizens. The Applicants made this request for a declaration of citizenship only after hearing of the recent decision in *Fisher-Tennant v Canada (Citizenship and Immigration)*, 2018 FC 151 [*Fisher-Tennant*], which the Respondent brought to this Court's attention at a pre-hearing teleconference held just days before the hearing of the Applications.

[29] I note that such a declaration of citizenship is unusual, and *Fisher-Tennant* is currently under appeal to the Federal Court of Appeal on a question of jurisdiction (File A-104-18).

[30] I find that reasoning in *Fisher-Tennant* is distinguishable from this matter in several key respects. First, in *Fisher-Tennant* the Court found that the record before it was complete (at para 20). As set out above, that is not the case here.

[31] Second, in *Fisher-Tennant* the Court found that the decision-maker had indeed made the "relevant finding of fact" required to decide the matter (at para 18). Here, it is the opposite: the Applicants challenge the Officer's findings of fact with respect to Yemeni law.

[32] Third, the Court in *Fisher-Tennant* was satisfied that only one outcome was legally permissible on the record (at para 35). Here, the record before me does not give rise to such a conclusion.

[33] Therefore, I will set aside the Decision and remit the matter for priority reconsideration by a new visa officer, to be conducted on a complete record, and in a fair manner. It will be the officer's task to make the requisite factual findings and determine whether the Applicant brothers are citizens under the *Citizenship Act*.

## VI. Costs

[34] With respect to costs, I note that they will not be awarded simply where an immigration official has made an erroneous decision (*Sapru v Canada (Citizenship and Immigration)*, 2011 FCA 35 at para 65). Rather, under Rule 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, costs shall not be awarded on an application for judicial review commenced under the *Citizenship Act* unless there are "special reasons" for doing so. The

threshold for “special reasons” is high (*Adesina v Canada (Citizenship and Immigration)*, 2010 FC 336 at para 12).

[35] In *Ndungu v Canada (Citizenship and Immigration)*, 2011 FCA 208 (at para 7), the Federal Court of Appeal set out the potential circumstances giving rise to “special reasons”, which include cases where (a) the Minister causes an applicant to suffer a significant waste of time and resources by taking inconsistent positions in the Federal Court and the Federal Court of Appeal, (b) an immigration official circumvents an order of the Court, (c) an immigration official engages in conduct that is misleading or abusive, (d) an immigration official issues a decision only after an unreasonable and unjustified delay, and (e) the Minister unreasonably opposes an obviously meritorious application for judicial review.

[36] With respect to delay, in this case, the Applicants’ previous applications for judicial review were discontinued in May 2015. The Citizenship Applications were not redetermined until two years later, in November 2017. I agree that this delay is regrettable and ideally the files should have been attended to in a more timely fashion by the Visa Office. However, I have not been persuaded that this case reaches the high threshold of “special circumstances” required to order costs (see *Gerges* at para 23; *Balepo v Canada (Citizenship and Immigration)*, 2017 FC 1104 at paras 39-41).

[37] Further, the Applicants have provided no evidence — and thus there is no basis on which to find — that any individual or group of officials at the Visa Office deliberately circumvented any order of this Court, or engaged in misleading or abusive conduct.

[38] Finally, I would point out that the Respondent in this case, as ably represented by its counsel, has conducted itself reasonably. In fact, I find that the Respondent has, through its counsel, acted in an exemplary fashion in light of the underlying circumstances for the following reasons.

[39] First, the Respondent did not oppose leave. Second, once leave was granted and a copy of the CTR obtained, the Respondent did not obfuscate or delay the proceedings in any way. The Respondent engaged in settlement discussions, appropriately conceded weaknesses in its case, and ultimately requested in its further consolidated memorandum of argument that the Decision be set aside and remitted for redetermination on a priority basis. Third, Respondent's counsel, as an officer of the Court, referred this Court and the Applicants to *Fisher-Tennant*, even though this authority runs counter to the Respondent's position in this case, a position then adopted by the Applicants.

[40] Last, but certainly not least, I note that the Respondent could have argued that the Decision be upheld despite the identified breaches of procedural fairness, pursuant to *Mobil Oil Canada Ltd v Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 SCR 202 and *Yassine v Canada (Minister of Employment and Immigration)*, (1994) 172 NR 308. However, the Respondent opted not to do so, and instead argued that the Applicants should be allowed to provide a full version of all relevant materials to the Visa Office — including potentially invoking section 5(4) of the *Citizenship Act*, which provides that the Minister may, in his discretion, grant citizenship to alleviate cases of special and unusual hardship.

[41] For all of these reasons, there is simply no basis upon which to order costs.

## VII. Certified Question

[42] At the hearing, the Respondent posed the following question for certification:

> Do the Federal Courts have the jurisdiction to make a determination on an application made under the *Citizenship Act*, where Parliament has empowered the Minister to make such a determination?

[43] The Respondent also filed post-hearing submissions in support of the certification of the above question.

[44] Following the hearing, the Principal Applicant instructed his counsel to deliver the following proposed certified question, which I reproduce below in the manner submitted to the Court:

> Applicant's
> Proposed Certified
> Question / Assalafi v MCI, T-1898-17
>
> Should
> be the merit key question in this particular case , for the purpose of verification , Among all possible possibilities within the Canadian Official Documentation , Can be the word "Adoption" means "Guardianship"? And if the clarification is well established , does the Federal Court of the jurisdiction to issue directed verdicts?

[45] Having considered the positions of the parties, I find that this is not an appropriate case in which to certify any question, including those proposed by the parties.

[46] First, while I agree with the Respondent that its proposed question for certification may involve a live issue, particularly given the appeal of *Fisher-Tennant*, it is nevertheless not appropriate for certification in this matter.

[47] This is because assuming, without deciding, that this Court has the jurisdiction to grant the type of declaratory relief requested by the Applicants at the hearing of the Applications, I would not do so in this case for the reasons set out above. As a result, this Court's jurisdiction to declare the Applicant brothers to be citizens — or to issue a directed verdict achieving that end — is not dispositive of the Applications. Accordingly, the proposed questions will not be certified (*Zhang v Canada (Citizenship and Immigration),* 2013 FCA 168 at para 9 [*Zhang*]).

[48] I also find that the Principal Applicant's other proposed question (i.e., whether the word "adoption" can mean "guardianship" in the circumstances of this case) is not appropriate for certification. This question is premised on this Court having found the Officer's conclusions with respect to Yemeni law to have been reasonable, something which this Court is not in a position to consider given the procedural deficiencies in the Decision and the incomplete CTR. As a result, this question, too, is not dispositive of the Applications.

## VIII. Conclusion

[49] The Applications are granted on the terms requested by the Respondent: the Decision will be set aside and remitted for redetermination on a priority basis. There is no award as to costs. No question will be for certified.

**JUDGMENT in T-1898-17, T-1899-17, T-1900-17, and T-1901-17**

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

1. The decision under review in Files T-1898-17, T-1899-17, T-1900-17, and T-1901-17 is set aside and is to be remitted for redetermination on a priority basis by a new decision-maker.
2. There is no award as to costs.
3. No question will be certified.

"Alan S. Diner"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

| | |
|---|---|
| **DOCKET:** | T-1898-17 |
| **STYLE OF CAUSE:** | REEMI SALEM ASSLAFI ET AL v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | MAY 22, 2018 |
| **JUDGMENT AND REASONS:** | DINER J. |
| **DATED:** | JUNE 6, 2018 |

**APPEARANCES:**

| | |
|---|---|
| A. Tom Leousis | FOR THE APPLICANTS |
| Eleanor Elstub | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| A. Tom Leousis<br>Barrister and Solicitor<br>Hamilton, Ontario | FOR THE APPLICANTS |
| Attorney General of Canada<br>Toronto, Ontario | FOR THE RESPONDENT |