Federal Court  Cour fédérale

Date: 20190513

Docket: IMM-2201-18

Citation: 2019 FC 655

Ottawa, Ontario, May 13, 2019

PRESENT: Madam Justice Roussel

BETWEEN:

WESAM ALHADDAD
LEMAR OMRAN

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Principal Applicant, Mrs. Wesam Alhaddad, and her minor daughter, Lemar Omran, seek judicial review of a decision of the Refugee Appeal Division [RAD] dated April 12, 2018, which confirmed the determination of the Refugee Protection Division [RPD] that the Applicants

were neither Convention refugees nor persons in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27.

II. Background

[2] The Principal Applicant is a stateless Palestinian who was born in Saudi Arabia. She has resided in Saudi Arabia most of her entire life, except for a period of six (6) years when she attended high school in Gaza. At first, she lived in Saudi Arabia under the sponsorship of her father's employer, and most recently under the sponsorship of her husband's employer.

[3] The minor Applicant is likewise a stateless Palestinian born in Saudi Arabia. She has lived in Saudi Arabia her entire life.

[4] On November 20, 2016, the Principal Applicant's husband received notice from his employer that his contract of employment would be terminated the following month due to non-availability of work. The notice gave him two (2) months to leave the country.

[5] On January 14, 2017, the Principal Applicant fled Saudi Arabia with her daughter for the United States as she feared being deported to Palestine where an individual with alleged ties to Hamas maintained a feud against her family and threatened to kill anyone related to her father. The Principal Applicant's husband remained in Saudi Arabia.

[6] On March 24, 2017, the Applicants illegally entered Canada and on April 7, 2017, they claimed refugee protection.

[7] In a decision dated May 24, 2017, the RPD found the Applicants to be neither Convention refugees nor persons in need of protection. The RPD determined that the proper country of reference for the claim was Saudi Arabia as the Principal Applicant had lived there virtually her entire life and admitted that she had no fear of living there except for the sole prospect of being deported to Gaza. The RPD thus found that the determinative issue in the claim was the credibility of the Principal Applicant's allegation that she would be deported to Gaza if she returned to Saudi Arabia. In concluding that this allegation was not credible, the RPD emphasized the fact that the Principal Applicant's husband had failed to flee Saudi Arabia despite his lack of status. It also found the Principal Applicant to be inconsistent in her description of her husband's employment search efforts and employment prospects in Saudi Arabia. Likewise, the RPD found the Principal Applicant's testimony evasive regarding her failure to adduce evidence of her exit authority [Iqama] from Saudi Arabia. Finally, the RPD viewed the Principal Applicant's failure to seek protection in the United States as indicative of a lack of subjective fear and demonstrative of asylum shopping.

[8] The Applicants appealed the RPD's decision to the RAD on the basis that the RPD had violated procedural fairness in not assessing Palestine as a country of reference and that it had erred in its assessment of credibility and subjective fear. They did not submit new evidence or request an oral hearing.

[9] On April 12, 2018, the RAD dismissed the appeal.

[10] The RAD first determined that there was no breach of procedural fairness stemming from the RPD's failure to examine the Applicants' claim in relation to Palestine as a country of former habitual residence [CFHR]. Relying on the Federal Court of Appeal's decision in *Thabet v Canada (Minister of Citizenship and Immigration)*, [1998] 4 FC 21 [*Thabet*], the RAD concluded that the RPD was not required to examine the Applicants' allegations of persecution in Palestine given the RPD's conclusion that the Applicants could return to Saudi Arabia.

[11] The RAD also rejected the Principal Applicant's assertion that she originally intended to seek asylum in the United States. The Principal Applicant explained that she only decided to come to Canada when Donald Trump was inaugurated as President and shortly thereafter started making orders banning refugee claimants from Muslim countries. The RAD noted that Donald Trump had already been elected President when the Principal Applicant arrived in the United States and that the Applicant had remained there for over two (2) months before entering Canada illegally. The RAD further considered the lack of effort on the part of the Principal Applicant to find out and file a claim immediately upon arrival in a safe country. The RAD agreed with the RPD that the Principal Applicant's failure to claim asylum in the United States was indicative of a lack of subjective fear.

[12] Finally, the RAD considered the Principal Applicant's argument that the RPD had erred in its assessment of her credibility. The RAD observed that the Applicants had not produced any evidence which would indicate that they had experienced any persecution or discrimination in Saudi Arabia due to the fact that they are stateless Palestinians. Relying on *Thabet*, the RAD

reiterated that the Applicants had the burden of demonstrating on the balance of probabilities that they are unable or unwilling to return to any CFHR.

[13] While the RAD disagreed with the RPD's negative credibility finding regarding the Applicants' failure to produce an Iqama, the RAD nevertheless agreed with the RPD that the Applicants had failed to produce reliable evidence which would indicate that they could not return to Saudi Arabia. The RAD emphasized that the Principal Applicant had not explained how her husband was able to remain in Saudi Arabia despite his status being terminated by his employer.

[14] Having concluded that the Applicants were able to return to Saudi Arabia at the time of the RPD hearing, the RAD then went on to deal with the Applicants' allegation that they no longer had a right to return to Saudi Arabia as a result of the termination of the Principal Applicant's husband's employment. Relying on the decision of this Court in *Chehade v Canada (Citizenship and Immigration)*, 2017 FC 282 [*Chehade*], which relied in part on the decisions of this Court in *Daghmash v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 889 (FCTD) (QL) at paragraphs 9 to 11 [*Daghmash*] and in *Marchoud v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1471 at paragraphs 16 and 17 [*Marchoud*], the RAD concluded that there was no evidence that the Applicants' inability to return to Saudi Arabia constituted persecution.

[15] The Applicants now seek judicial review of the RAD's decision. They submit that the RAD: (1) erred in its assessment of their CFHR; (2) breached their right to procedural fairness; and (3) erred in its assessment of the Principal Applicant's credibility.

III. Analysis

[16] Credibility issues and issues regarding the determination of a CFHR raise questions of fact and mixed fact and law and are consequently both to be reviewed on the reasonableness standard (*Qassim v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 226 at para 27; *Chehade* at para 13; *Kaddoura v Canada (Citizenship and Immigration)*, 2016 FC 1101 at para 11).

[17] In reviewing a decision against the reasonableness standard, the Court must consider the justification, transparency and intelligibility of the decision-making process, and whether the decision falls within a range of possible, acceptable outcomes which are defensible in light of the facts and the law (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59 [*Khosa*]; *Dunsmuir v New* Brunswick, 2008 SCC 9 at para 47 [*Dunsmuir*]).

[18] Moreover, it is not the function of this Court upon judicial review to substitute its own view of a preferable outcome and to reweigh the evidence that was before the RAD and the RPD (*Khosa* at paras 59, 61). The RAD's decision "should be approached as an organic whole, without a line-by-line treasure hunt for error" (*Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34 at para 54; *Newfoundland*

and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board), 2011 SCC 62 at paras 14, 16).

[19] Regarding the alleged breach of procedural fairness, the Federal Court of Appeal recently clarified that questions of procedural fairness do not necessarily lend themselves to a standard of review analysis. The Court's role is rather to determine whether the procedure was fair having regard to all of the circumstances (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54; *Dunsmuir* at para 79).

[20] Although the Applicants have framed the issues differently in their memorandum of fact and law, the essence of their argument is that the RAD should have engaged in an analysis of whether they face persecution in Palestine, also a CFHR, given that they were no longer able to return to Saudi Arabia as a result of their residency cards and re-entry visas for Saudi Arabia having expired following the issuance of the RPD's decision.

[21] It is well established that it is not every persecuted person's absolute right to come to Canada and demand protection. They must exhaust all of their other alternatives before their claim can be determined in Canada (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at 709; *Thabet* at paras 7, 15; *Chehade* at para 20; *Rahman v Canada (Citizenship and Immigration)*, 2016 FC 1355 at para 13).

[22] The decision of the Federal Court of Appeal in *Thabet* sets out the approach for determining Convention refugee claims for stateless persons, who have habitually resided in more than one (1) country:

> …
>
> In order to be found to be a Convention refugee, a stateless person must show that, on a balance of probabilities he or she would suffer persecution in any country of former habitual residence, and that he or she cannot return to any of his or her other countries of former habitual residence.
>
> (*Thabet* at para 30.)

[23] In other words, if the tribunal determines that there is a CFHR where there is no fear of persecution and to which the claimant has a right of return, then the claim for protection must fail (*Thabet* at para 29).

[24] In the case before me, the Applicants do not dispute that Saudi Arabia is a CFHR. The Principal Applicant has lived there most of her entire life and her daughter has lived there her entire life. The Principal Applicant also testified that she did not fear living in Saudi Arabia. Contrary to the argument advanced by the Applicants, the RAD did not exclude Palestine as a possible CFHR. It simply wasn't necessary for it to engage in the analysis of whether Palestine was a CFHR and whether the Applicants' would be persecuted there. Even if Palestine was one of the Principal Applicant's CFHR regarding which she could possibly establish a well-founded fear of persecution, in the absence of a claim of persecution against Saudi Arabia, it was reasonable for both the RAD and the RPD to focus their analysis on Saudi Arabia and the Applicants' ability to return to this country.

[25] In any event, the Applicants' counsel acknowledged that the RPD had no obligation to consider the Applicants' claim of persecution in Palestine given its conclusion that the Applicants had not adduced credible evidence demonstrating that they were unable to return to Saudi Arabia. The Applicants allege however that when the matter came before the RAD, their residency cards as well as their exit and re-entry visas for Saudi Arabia had expired, thus resulting in their inability to return to Saudi Arabia. They submit that this change in circumstances, which was apparent on the record, required that the RAD consider their risk of persecution in Palestine.

[26] I am not persuaded by the Applicants' arguments.

[27] The RAD did indeed consider the Applicants' allegation that they could no longer return to Saudi Arabia because their status there had expired. However, like the RPD, the RAD found that the Principal Applicant's failure to explain how her husband had been able to remain in Saudi Arabia despite his employment being terminated undermined the credibility of the Applicants' allegation they could not return to Saudi Arabia.

[28] Given the lack of clear evidence concerning the husband's status in Saudi Arabia, to which the Applicants' status were tied, I find this conclusion to be reasonable and supported by the record.

[29] While in my view the RAD could have ended its analysis there – given the absence of a denial of a right to return to Saudi Arabia – it nevertheless considered whether the Applicants'

alleged inability to return to Saudi Arabia would, in itself, constitute persecution as per the teachings of the Federal Court of Appeal in *Thabet* (*Thabet* at paras 31-32). The RAD referred to the Applicants' allegation that they were unable to return to Saudi Arabia because their Iqamas had been cancelled as a result of the Principal Applicant's husband's employment being terminated. The RAD found that this did not amount to an act of persecution and that it was insufficient to permit the Applicants to meet the definition of a Convention refugee (*Chehade* at para 35; *Marchoud* at paras 16-17; *Daghmash* at paras 9, 11).

[30] I agree with the Respondent that this last finding was subsidiary to its finding regarding the credibility of the Applicants' allegation they could not return to Saudi Arabia.

[31] Moreover, given the Applicants' lack of effort to file an asylum claim in the United States combined with the fact that the Principal Applicant had previously been denied a Canadian visa, it was reasonably open to the RAD to agree with the RPD that the Applicants' failure to file for asylum in the United States was indicative of a lack of subjective fear of persecution (*Bobic v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1488 at para 6).

[32] To conclude, the Applicants have failed to persuade me that the RAD's decision falls outside of the range of possible, acceptable outcomes which are defensible in light of the facts and the law. Moreover, while the Applicants' may disagree with the RAD's findings, it is not this Court's role to reweigh the evidence before the RAD or to substitute its view of a preferred outcome (*Khosa* at para 59; *Dunsmuir* at para 47).

[33] Accordingly, the application for judicial review is dismissed. No questions of general importance were proposed for certification and I agree that none arise.

JUDGMENT in IMM-2201-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;

2. The style of cause is amended to correctly identify the second Applicant as "Lemar Omran";

3. No question of general importance is certified.

"Sylvie E. Roussel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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