Date: 20071218

Docket: IMM-2377-07

Citation: 2007 FC 1329

Ottawa, Ontario, December 18, 2007

PRESENT: The Honourable Mr. Justice Blais

BETWEEN:

EHAB MOHAMED MO EL GHAZALY
SALWA TAWFIK MO SHALABY
SHADI EHAB MOHA EL GHAZALY
SHAIMAA EHAB MO EL GHAZALY

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), for judicial review of a decision rendered by a Pre-Removal Risk Assessment (PRRA) officer, Ms Charlaine Lapointe (the officer), dated April 19, 2007, to dismiss an application for permanent residence from within Canada on humanitarian and compassionate (H&C) grounds.

BACKGROUND

[2] Ehab Mohamed Mo El Ghazaly (the principal applicant), his wife Salwa Tawfik Mo Shalaby and their two children Shaimaa Ehab Mo El Ghazaly and Shadi Ehab Moha El Ghazaly (the applicants) are citizens of Egypt.

[3] Except for the principal applicant, who only arrived in Canada on January 13, 2003, the applicants arrived in Canada on September 17, 2002. They applied for permanent residence based on H&C grounds on February 28, 2003.

[4] They made a refugee claim on August 18, 2003, but their claim was rejected on March 12, 2004 on the basis of lack of credibility. The decision was also based on the fact that they did not seek protection at the first available moment and on the basis that there was insufficient documentation to show a criminal conviction in Egypt. The application for leave for judicial review of that decision was denied June 25, 2004.

[5] On July 26, 2006, the applicants applied for a Pre-Removal Risk Assessment (PRRA) which was rejected on April 19, 2007.

DECISION UNDER REVIEW

[6] The officer denied the H&C exemption on the grounds that the applicants failed to demonstrate that they would suffer unusual, undeserved or disproportionate hardship if they were required to apply for permanent residence from Egypt.

ISSUES FOR CONSIDERATION

[7] After reading their submissions, I believe there are essentially two questions to be determined:

a. Did the officer breach her duty of procedural fairness by failing to confront the applicants with her concerns about the authenticity of the Court documents submitted or by failing to assess the evidence about Egypt?

b. Did the applicants' lawyer's conduct breach their right to be heard?

PERTINENT LEGISLATION

[8] The humanitarian and compassionate exemption is found at subsection 25(1) of the Act, and reads as follows:

25. (1) The Minister shall, upon request of a foreign national who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.	**25.** (1) Le ministre doit, sur demande d'un étranger interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, de sa propre initiative, étudier le cas de cet étranger et peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des circonstances d'ordre humanitaire relatives à l'étranger — compte tenu de l'intérêt supérieur de l'enfant directement touché — ou l'intérêt public le justifient.

STANDARD OF REVIEW

[9] It is well established that the applicable standard of an H&C decision is reasonableness *simpliciter* (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paragraph 62). However, on allegations of procedural fairness, the decision will be reviewed on a standard of correctness (*Canada (Attorney General) v. Sketchley*, 2005 FCA 404, at paragraph 53).

ANALYSIS

a. ***Did the officer breach her duty of procedural fairness by failing to confront the applicants with her concerns about the authenticity of the Court documents submitted or by failing to asses the evidence about Egypt?***

[10] In an H&C application, applicants have the onus of proving their claim (*Owusu v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38 at paragraph 8). The four photocopied Court documents from Egypt submitted by the applicants indicate that the principal applicant appealed his criminal convictions and the documents are dated April 15, 2004.

[11] It appears from the officer's decision that even if he had considered these documents authentic, they were not sufficient, without further evidence, to prove the hardship the applicants claim they would face if returned to Egypt, as they are of no use to explain the context of the sentencing. The officer found that there was no evidence to substantiate their claim.

[12] Furthermore, I would like to point out that the decision rendered by the Immigration and Refugee Board (IRB) dated March 12, 2004, on the same set of alleged facts, found that the story concerning his association with Mr. Kamal Moubarak, who supposedly has close connections

with the President Moubarak, lacked credibility mainly because of the discrepancies between his testimony and his Personal Information Form (the PIF).

[13] The IRB also refers to documents provided by the applicants in these words:

> Un autre élément important de la présente demande est le fait que le demandeur, qui a témoigné craindre réellement pour sa vie depuis la réception de jugements définitifs émis contre lui en avril 2002, n'a pas fourni la preuve de l'existence de ces jugements. […] Le demandeur a déposé cinq certificats d'appel concernant ces jugements […]. Questionné à savoir pourquoi il n'avait pas produit les jugements définitifs d'avril 2002 au dossier, mais avait plutôt déposé des certificats d'appel de ces jugements, il a répondu qu'il avait dû quitter son pays en catastrophe, et que les jugements étaient restés en Égypte. Le tribunal ne peut accepter ces explications et considère que même si le demandeur a dû quitter en catastrophe, il aurait pu obtenir, depuis son arrivée au Canada, les jugements définitifs d'avril 2002, ce qui aurait appuyé sa revendication. Le tribunal a donc de sérieux doutes que ces jugements définitifs visaient son arrestation, tel qu'il allègue.

[14] Considering that the applicants have submitted new documents, which are still not equivalent to a final written decision but are certificates simply confirming that there was a final decision rendered April 29, 2002, I find it curious that they are now surprised at the outcome of their H&C application. As Justice Luc J. Martineau held in *Tuhin v. Canada (Citizenship and Immigration)*, 2006 FC 22, a judicial review of a PRRA decision, at paragraph 5:

> [i]n this case, the application for protection essentially raised the same allegations of risk that were previously raised before the IRB, and the PRRA Officer cannot be reproached for arbitrarily excluding evidence that had already been submitted to the IRB. With regard to the new pieces of evidence introduced by the applicant, the PRRA Officer clearly explained why these were not probative or conclusive in the circumstances.

I believe the same can be said in the case at bar, even if the threshold of risk to life or cruel and unusual punishment is lower than in a PRRA application.

[15] As Justice Danièle Tremblay-Lamer recently stated in *Rafieyan v. Canada (Citizenship and Immigration)*, 2007 FC 727, at paragraph 21:

> [i]t is trite law that an officer is presumed to have considered all of the evidence before him or her, and that the assessment of weight to be given is a matter within his or her discretion and expertise (*Hassan v. Canada (Minister of Employment and Immigration)* (1992), 147 N.R. 317 (F.C.A.), [1992] F.C.J. No. 946 (QL); *Shah v. Canada (Minister of Public Security and Emergency Preparedness*, 2007 FC 132, [2007] F.C.J. No. 185 (QL).

[16] Furthermore, the same officer also assessed the PRRA application, which was denied after a clear assessment of the objective documentation – which reveals that detention condition are especially deplorable and that torture does occur in Egyptian prisons – on the basis that she was not satisfied the principal applicant would be subject to hardship.

[17] The applicants, in their "Request for exemption from permanent resident visa requirement", clearly refer only to factors that have been considered by the officer. The officer also assessed the best interest of the child, which the applicants did not even allege. After having considered the objective evidence, she concluded that the child would have access to education notwithstanding the fact that she is a girl. The applicants did not show this Court how the officer failed to consider the evidence before her.

[18] The applicants rely on the decision rendered by Chief Justice Allan Lutfy in *Pinter v. Canada (Citizenship and Immigration)*, 2007 FC 986. This is clearly not a case where the officer

made an error of law by concluding that she was not required to deal with risk factors in her assessment of the humanitarian and compassionate application. She did assess the risk factors but decided to give little weight to those factors because the applicants failed to submit credible evidence supporting the facts alleged. Essentially, the applicants are asking this Court to substitute its own analysis of the weight and probative value to be given to the evidence in risk assessment, which is not for the Court to determine.

b. Did the applicants' lawyer's conduct breach their right to be heard?

[19] The applicants allege that their former lawyer failed to file the original version of the Court documents, which the applicants had provided to him. They submitted a letter signed by the former counsel dated July 10, 2007, stating the following:

> La présente e[s]t pour vous confirmer que j'ai représenté Monsieur Ehab dans les dossiers de demande CH et ERRAR. Je confirme aussi que Monsieur EL-GHAZALY était en possession des originaux des jugements émis contre lui en ÉGYPTE, mais je ne peux confirmer qui les aurait déposés auprès de CIC.

[20] As noted by the respondent, the general rule is that a representative acts as an agent for the client and the client must bear the consequences of having hired poor representation. Recently, Justice Michel M.J. Shore in *Vieira v. Canada (Minister of Public Safety and Emergency Preparedness*), 2007 FC 626, held at paragraph 29:

> [t]he jurisprudence is clear that an applicant must be held to their choice of adviser and further, that allegations of professional incompetence will not be entertained unless they are accompanied by corroborating evidence. Such evidence usually takes the form of a response to the allegation by the lawyer in question, or, a complaint to the relevant Bar Association. In this case, the Applicants have made an assertion, without providing any evidence in support of their allegation. A failure to provide notice and an opportunity to respond to counsel whose professionalism is

> being impugned is sufficient to dismiss any allegations of incompetence, misfeasance or malfeasance. (*Nunez v. Canada (Minister of Citizenship and Immigration)*, (2000) 189 F.T.R. 147, [2000] F.C.J. No. 555 (QL), at para. 19; *Geza v. Canada (Minister of Citizenship and Immigration)*, (2004) 257 FTR 114, [2004] F.C.J. No. 1401 (QL), *Shirvan v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1509, [2005] F.C.J. No. 1864 (QL), at para 32; *Nduwimana* v. *Canada (Minister of Citizenship and Immigration)*, 2005 FC 1387, [2005] F.C.J. No. 1736 (QL); *Chavez*, above.) [my emphasis]

[21] In the present case, the principal applicant states that he has filed a complaint against his former lawyer. This is far from being an exceptional case where “counsel’s alleged failure to represent or alleged negligence are obvious on the face of the record and have compromised a party's right to a full hearing” (*Dukuzumuremyi v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 278, at paragraph 18). Therefore, this allegation is rejected.

[22] For the reasons noted above, this application is dismissed.

[23] Counsel did not provide any question for certification.

JUDGMENT

1. The application is denied.

2. No question for certification.

"Pierre Blais"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2377-07
STYLE OF CAUSE:	**EHAB MOHAMED MO EL GHAZALY, SALWA TAWFIK MO SHALABY, SHADI EHAB MOHA EL GHAZALY, SHAIMAA EHAB MO EL GHAZALY,EHAB MOHAMED MO EL GHAZALY ET AL v. MCI**
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