Federal Court  Cour fédérale

**Date: 20111031**

**Docket: IMM-1432-11**

**Citation: 2011 FC 1234**

**Ottawa, Ontario, October 31, 2011**

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

**BETWEEN:**

**DALAL EL KAISSI**
**(A.K.A. DALAL FAHED EL KAISSI.), AND**
**KHEIREDDINE KADDOURA; AND**
**CHAYMAA RIM KADOOURA.**
**NASSIMA KADDOURA, FAHED KADOOURA,**
**(A.K.A. FAHED KHEIREDDI KADDOURA.),**
**KHALED KADDOURA. (A.K.A. KHALED**
**KHEIREDD KADOOURA), AND KAMEL**
**KADDOURA. (A.K.A. KAMEL KHEIREDDDI**
**KADDOURA.), BY THEIR LITIGATION**
**GUARDIAN DALAL EL KAISSI**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP**
**AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is an application for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board), dated February 11, 2011. The Board determined that the Applicants were not Convention refugees or persons in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA).

[2] For the following reasons, this application is allowed.

## I. Facts

[3] The Applicants (Dalal El Kaissi and Kheireddine Kaddoura as well as their five children, Chaymaa Rim Kadooura, Nassima Kaddoura, Fahed Kadooura, Khaled Kaddoura and Kamel Kaddoura) are seeking protection based on threats made to the father, Kheireddine Kaddoura (the Principal Applicant). In Lebanon, Hezbollah suspects that the Principal Applicant is an Israeli collaborator. The Applicants are citizens of Lebanon, with the exception of Fahed Kadooura and Khaled Kaddoura who are citizens of the United States of America (US).

[4] The Principal Applicant owned a summer house in Al Hibaria, a village under Israeli military occupation. In 1999, two masked men came to the summer home claiming to be fleeing the Israelis and looking for a place to hide. Concerned that his home would be confiscated by the Israelis, the Principal Applicant refused and told them he would inform the officer who patrolled the area. The men insisted they would kill his family if he did not help them and accused him of collaborating with the Israelis. When the men left, they told the Principal Applicant not to report what happened.

[5] In 2000, Hezbollah took control of the area around the summer home and began looking for collaborators. The family left the summer home but continued to be visited and threatened by Hezbollah. As a result, they fled to Benin.

[6] The Principal Applicant also visited the US to see children from a previous marriage in 2005. At that time, he learned that his brother had been detained and interrogated to determine his whereabouts on a recent return to Lebanon. The Principal Applicant also claims that a warrant for his arrest was issued in 2007.

[7] Thereafter, the family decided to remain in the US. Although they arrived in the country in 2005, no asylum claim was made until 2007 or 2008. The Principal Applicant insists that he initially met with counsellors or paralegals who advised him that making a claim would not be helpful. He first spoke with a US asylum attorney just prior to making his claim. His claim was, however, denied by US authorities and he did not file an appeal.

[8] In 2009, the Principal Applicant and his family came to Canada and filed refugee claims at the port of entry.

## II. Decision Under Review

[9] The Board determined that there was insufficient credible evidence of a serious possibility the Applicants would face persecution or be subjected to a risk to life or of cruel and unusual

punishment on returning to Lebanon. Of particular concern to the Board was the lack of corroborating documentation of recent threats to the Principal Applicant. A copy of an alleged arrest warrant issued in 2007 was not presented as part of the claim.

[10] Moreover, the Board did not consider the Principal Applicant's behaviour consistent with a true fear of returning to Lebanon. His US visa expired six months after his arrival in 2005 and he delayed making a refugee claim until 2007 or 2008. Despite the Principal Applicant's insistence that he was initially advised against making a claim and that he thought his son would be sponsoring him, the Board found that he was not timely or purposeful in making his US asylum claim. It was also noted that the Principal Applicant left the US without making an appeal.

[11] The Principal Applicant was found to have re-availed himself of state protection in Lebanon. He visited the US in 2000 and 2004. Following the first visit, he returned to his country of nationality, claiming that he did not want to be separated from his family. The Board found that the decision to return to the country where he would be at risk suggests he did not have a subjective fear.

## III. Issues

[12] This application raises the following issues:

(a) Was there a breach of natural justice or procedural fairness arising from the incompetence of counsel in failing to provide a letter confirming the issuance of an arrest warrant for the Principal Applicant?

(b) Was the Board's assessment of the Principal Applicant's subjective fear of returning to Lebanon reasonable?

(c) Was it reasonable for the Board to find that the Principal Applicant re-availed to Lebanon?

## IV. Standard of Review

[13] Questions of procedural fairness are reviewed on a standard of correctness (see *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, 2009 CarswellNat 434 at para 43).

[14] By contrast, questions of fact, discretion and policy as well as questions where the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 51). As articulated at paragraph 47 in *Dunsmuir*, reasonableness is "concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process" as well as "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."

## V. Analysis

### Issue A: *Procedural Fairness*

[15] It is well recognized that incompetence of counsel can give rise to a breach of procedural fairness that would justify quashing a decision. The Supreme Court of Canada has stated that "it must be established, first, that counsel's acts or omissions constituted incompetence and second, that a miscarriage of justice resulted" (*R v GDB*, 2000 SCC 22, 2000 Carswell Alta 348 at para 26).

[16] In the refugee context, similar guidance is provided by the jurisprudence of this Court. A recent decision of Justice Paul Crampton, *Memari v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1196, 2010 CarswellNat 4557 at para 36, summarized the relevant considerations:

> [36] However, in proceedings under the IRPA, the incompetence of counsel will only constitute a breach of natural justice in "extraordinary circumstances" (*Huynh v. Minister of Employment and Immigration*, (1993), 65 F.T.R. 11 at 15 (T.D.)). With respect to the performance component, at a minimum, "the incompetence or negligence of the applicant's representative [must be] sufficiently specific and clearly supported by the evidence" (*Shirwa*, above, at 60). With respect to the prejudice component, the Court must be satisfied that a miscarriage of justice resulted. Consistent with the extraordinary nature of this ground of challenge, the performance component must be exceptional and the miscarriage of justice component must be manifested in procedural unfairness, the reliability of the trial result having been compromised, or another readily apparent form.

[17] Justice Crampton proceeded to find that the incompetence of counsel as a result of illness, considered cumulatively, led to unfairness. In particular, the failure of counsel to produce an

amended Personal Information Form (PIF) led the Board to find inconsistencies in the claimant's story.

[18] Based on the "extraordinary circumstances" that arose in the present case, I also find that incompetence of counsel amounted to a breach of procedural fairness. There is evidence that the performance of the Principal Applicant's counsel was deficient. He did not assist the Principal Applicant in filling out his PIF and left this to his assistant. There was no meeting with the Principal Applicant until two days before the hearing where it was indicated that the materials from the Principal Applicant's US asylum claim would be made available. Perhaps most significant, however, is the failure to produce the letter referring to the Principal Applicant's arrest warrant that ultimately proved critical to the Board's assessment of the claim. The only explanation counsel was able to provide at the hearing for these issues was that he was moving offices at the time and there was some confusion regarding files.

[19] A review of the Board's decision also makes clear that the Principal Applicant was prejudiced and a miscarriage of justice resulted. The Board reached a critical credibility finding as to the lack of objective fear based on the Principal Applicant's failure to produce a letter confirming the 2007 arrest warrant. This finding served as a basis for the remainder of the decision. The Principal Applicant stated in oral testimony, and his counsel confirmed, that he thought that information would be available in his file.

[20] The Respondent suggests that while it appears former counsel was partly to blame, the Principal Applicant also had a role to play, particularly in failing to include the document on his

PIF. The law is clear that negligence of counsel should not cause an applicant, who has acted with care, to suffer (see for example *Jane Doe v Canada (Minister of Citizenship and Immigration)*, 2010 FC 285, 2010 CarswellNat 1220 at para 28). I see no reason, however, to find that the Applicants had not acted with care in this case. By the counsel's own acknowledgement, the Principal Applicant believed the letter would be presented as part of the package of documents related to his US asylum claim.

[21] A breach of procedural fairness inevitably occurs where the incompetence of counsel prevents a refugee claimant from presenting critical evidence to satisfy the Board and leads to negative credibility findings that permeate the entire decision.

Issue B: *Subjective Fear*

[22] The Principal Applicant submits that it was unreasonable for the Board to rely on the delay in making a US claim and, secondarily, the failure to pursue an appeal before coming to Canada to find that his behaviour was inconsistent with someone having a subjective fear of persecution or risk.

[23] He insists that he provided a suitable explanation for the delay. He believed his son could sponsor him. Pointing to the decision of *Papsouev v Canada (Minister of Citizenship and Immigration)*, 168 FTR 99, [1999] FCJ No 769 at para 14 where the Court found that a delay in pursuing a refugee claim could be explained by efforts to initially obtain permanent resident visas,

he claims the conclusion of the Board in his case was similarly unreasonable. He also states that he initially relied on the advice of a paralegal that it would not be helpful to pursue a claim.

[24] In relation to his decision not to pursue an appeal in the US before coming to Canada, he explains that he was left in a difficult situation as he had young children to care for but was unable to drive or obtain basic utilities because he had no social insurance number. He also suggests that further delays would jeopardize any ability to make a claim in Canada.

[25] However, the Respondent contends that it was reasonable for the Board to find that his behaviour was inconsistent with someone who had a genuine fear for their lives or safety. They note that "[t]he lack of evidence going to the subjective element of the claim is a fatal flaw which in and of itself warrants dismissal of the claim, since both elements of the refugee definition--subjective and objective--must be met" (*Kamana v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 1695, 94 ACWS (3d) 338 at para 10).

[26] The Respondent insists that the Board considered the explanations provided by the Applicants but nonetheless found his actions inconsistent with a true fear. He did not make a claim at the earliest opportunity to do so as this Court had found fatal in the past (see *Riadinskaia v Canada (Minister of Citizenship and Immigration)*, [2001] FCJ No 30, 102 ACWS (3d) 967 at para 7).

[27] I must find that the Board's assessment of the delay in pursuing a US claim and failure to consider an appeal was reasonable. It is for the Board to decide "on the basis of the evidence before

and its assessment of the claimant, the significance of delay in the case before it" (*Canada (Minister of Citizenship and Immigration) v Sivalingam-Yogarajah*, 2001 FCT 1018, [2001] FCJ No 1414 at para 18). While the Board did not give the Principal Applicant's explanations the weight he would have preferred, this evidence was properly considered and balanced against the fact that he did not bring his refugee claim forward until questions were raised by US authorities. It was reasonably open to the Board to doubt his subjective fear given the inconsistent behaviour.

Issue C: *Re-Availment*

[28] This Court has confirmed that an individual returning to a country where they fear persecution makes the existence of that fear unlikely (*Kabengele v Canada (Minister of Citizenship and Immigration)* (2000), 197 FTR 73, 2000 CarswellNat 4335 at para 41). Regardless, it is also acknowledged that "re-availment" is not a temporary visit but requires an intention to permanently reside in that country before physical presence will negate refugee status (*Camargo v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1434, [2003] FCJ No 1830 at para 35).

[29] An individual may be compelled to return to the country for reasons seemingly beyond their control (such as the birth of child, see *Kanji v Canada (Minister of Citizenship and Immigration)*, [1997] FCJ No 374, 70 ACWS (3d) 525; or to care for a sick mother, see *Shanmugarajah v Canada (Minister of Employment and Immigration)*, [1992] FCJ No 583, 34 ACWS (3d) 828 (FCA)). Absent an explanation or pressing need, however, re-availment is considered voluntary and calls the individual's subjective fear into question. For example, this Court has found that returning on a holiday or to investigate business opportunities would not constitute having been compelled to

return (see *Shaikh v Canada (Minister of Citizenship and Immigration)*, 2005 FC 74, [2005] FCJ No 87; *Ali v Canada (Minister of Employment and Immigration)*, 112 FTR 9, [1996] FCJ No 558).

[30] As a consequence, the primary issue that I must consider is whether it was unreasonable for the Board to find that the Principal Applicant re-availed to Lebanon in the sense that he was truly compelled to return to Lebanon in 2000 without making a refugee claim in the US. He insists that his motivation for returning was directly related to the risk he faced because he was attempting to get his family out of Lebanon and to Benin.

[31] As the Respondent highlights, however, the Principal Applicant's testimony referred to concern that a refugee claim would take a long time and he did not want to be away from his family. It was a voluntary choice to avoid separation from the family.

[32] I am inclined to agree with the Respondent. Absent some additional compelling reason that his temporary absence from the family would make him unable to pursue a claim, it was open to the Board to draw a negative inference from his re-availment to Lebanon. If the Principal Applicant had a genuine and immediate threat to his life with no intention of remaining in Lebanon, it is reasonable to expect him to make a claim at the earliest opportunity and not return to the country where he feared persecution or risk. This would more effectively address the threat to himself and consequently his family.

## VI. Conclusion

[33] The incompetence of counsel resulted in a breach of procedural fairness. Despite the reasonableness of the remainder of the decision regarding subjective fear and re-availment, the negative credibility finding based on the failure to produce a document and establish objective fear at the outset prejudiced the Principal Applicant's claim. In my opinion, it is far from certain that a reconstituted Board would necessarily reach the same overall results. This is sufficient to warrant reconsideration by a reconstituted panel of the Board.

[34] Accordingly, this application for judicial review is allowed.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** this application for judicial review is allowed.

" D. G. Near "

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | **IMM-1432-11** |
| **STYLE OF CAUSE:** | **DALAL EL KAISSI (A.K.A. DALAL FAHED EL KAISSI) ET AL. v. MCI** |
| **PLACE OF HEARING:** | **TORONTO** |
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| **REASONS FOR JUDGMENT AND JUDGMENT BY:** | **NEAR J.** |
| **DATED:** | **OCTOBER 31, 2011** |

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