Federal Court  Cour fédérale

Date: 20120606

Docket: IMM-5650-11

Citation: 2012 FC 710

Toronto, Ontario, June 6, 2012

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

MURSAL FARAH ALI
HOSPITALITY HOUSE REFUGEE MINISTRY INC.

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

AND BETWEEN:

Docket: IMM-5652-11

ABDULLAH MOHAMMED KARSHE
HOSPITALITY HOUSE REFUGEE MINISTRY INC.

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

REASONS FOR JUDGMENT AND JUDGMENT

[1] These reasons pertain to two applications for judicial review brought by Mursal Farah Ali and his brother-in-law, Abdullah Mohamed Karshe, from decisions refusing their applications for permanent resident visas as members of the 'Convention refugee abroad' or 'country of asylum' classes. In accordance with the Order of Justice Scott, the two applications were heard together.

[2] For the reasons that follow, I am not persuaded that the applicants were treated unfairly in the visa assessment process. Nor have they persuaded me that the decisions refusing their applications for permanent residence were unreasonable. Consequently, the applications for judicial review will be dismissed.

Background

[3] Mr. Ali, Mr. Karshe and their respective family members are asylum seekers who currently reside together in Nairobi, Kenya.

[4] The Hospitality House Refugee Ministry and Abdelaziz Mohamed Karshe sponsored the applicants for permanent residence in Canada as Convention refugees abroad or as humanitarian-protected persons abroad. Abdelaziz Mohamed Karshe lives in Winnipeg and is Abdullah Mohamed Karshe's brother.

[5] Abdullah Mohamed Karshe is a 39-year-old Somali national and former truck driver. Mr. Karshe says that in July of 2007, his truck was bombed and his wife and son were killed in Mogadishu. He and his family fled to Kenya shortly thereafter. On his application for a permanent

resident visa, Mr. Karshe listed three dependent children, including his putative daughter, Farhia Abdullahi Mohamed, who was allegedly born in 1991.

[6] Mr. Karshe's sister, Sahro Mohamed Karshe, is married to the second principal applicant, Mr. Ali. The two families claim to have fled Somalia together and to have arrived in Kenya on August 2, 2007. Mr. Ali listed seven dependents on his visa application, including his putative son, Abdihodan Mursal Farah, who was allegedly born in 1993.

[7] On June 15, 2011, the applicants were interviewed by Visa Officer Carole Sauvé at the Canadian High Commission in Nairobi in connection with their applications for permanent resident visas. Officer Sauvé interviewed Mr. Ali and Mr. Karshe separately, one after the other. She was satisfied that their stories were credible, that they did not have a reasonable prospect of a durable solution in a country other than Canada, and that they did not raise any admissibility concerns. Accordingly, she informed Mr. Ali and Mr. Karshe that they met the country of asylum class definition and referred them for medical examinations.

[8] The medical examinations were scheduled to take place at the International Organization for Migration Clinic in Nairobi on July 5, 2011. The examinations were not completed, however, as discrepancies were noted between the photographs on file for Farhia Abdullahi Mohamed and Abdihodan Mursal Farah and the people who actually presented themselves for medical examinations. The Clinic contacted the Canadian High Commission to inform it of the situation. This led to the applicants being called in for a second interview at the High Commission offices.

[9] On July 13, 2011, Visa Officer Erik Mjanes interviewed the applicants. He noted that it was obvious that the photographs submitted with the applications did not match two of the children attending the interview. The Officer noted that the person identified as Farhia in the photo looked to be about 20 years old, whereas the young woman in front of him appeared to be about 13 or 14 years of age.

[10] Farhia told the visa officer that she was in Grade 8. She explained that she did not look like the person in her photo because she had been ill with typhoid fever at the time that the photo was taken, and that she had since gained weight.

[11] Abdihodan explained that he did not look like the person in the photograph as he had been much younger when his photo was taken in 2006.

[12] Once he had interviewed the two children, Officer Mjanes brought Mr. Karshe into the room. Mr. Karshe appeared to be very nervous, and was unable to answer basic questions about his putative daughter.

[13] When pressed by the Officer to tell the truth, Mr. Karshe asked the children to leave the room. He then explained to Officer Mjanes that he had found Farhia lying on the ground during the fighting in Mogadishu on the day his wife and son were killed. He adopted her as his child, and neither she nor his other children were aware that she is not his biological daughter. Mr. Karshe stated that he did not disclose Farhia's true identity on his application for permanent residence because he did not want the children to discover the truth about her origins. According to Mr.

Karshe, the photo on file was of his real daughter, who is married and lives in Ethiopia with her two children.

[14] On its face, Mr. Karshe's explanation for his deception makes no sense. His putative daughter would have been around 10 years old at the time of her alleged adoption. Mr. Karshe's other children would have been 15 and 17 years old at the time of the adoption. All of the children would therefore clearly have been aware of another child suddenly joining the family.

[15] Officer Mjanes questioned Mr. Karshe about the fact that he did not have any documents from the United Nations High Commission for Refugees (UNHCR) or any other identity documents issued prior to May of 2011, even though he claimed to have attended at the UNHCR offices and Kenyan Department of Refugee Affairs (DRA) offices in Nairobi on several occasions after arriving in Kenya in 2007. The Officer noted that all asylum seekers who approach the UNHCR for assistance receive documentation. After further questioning, Mr. Karshe changed his story and claimed that he had never gone to the UNHCR offices.

[16] Mr. Karshe was excused, and Officer Mjanes then interviewed Mr. Ali. Mr. Ali explained that the person identified as his son, Abdihodan, was not in fact his real son but was his nephew, an orphan by the name of Ali Mohamed Farah. Mr. Ali told Officer Mjanes that the child's mother had died during childbirth and that his father was killed during the war in Somalia in July of 2007. A few minutes later, however, Mr. Ali told Officer Mjanes that Ali's father was alive still at the time of the visa application.

[17] According to Mr. Ali, the real Abdihodan had left Nairobi for Sudan the year before, and Mr. Ali had not heard from him since. Mr. Ali said he had adopted Ali Mohamed, but he had not been included on the visa application because the application was filled out by the sponsor. Mr. Ali says that he misrepresented the child's identity because he was concerned that Canadian immigration authorities would expect him to produce his son Abdihodan. He also did not want to leave his nephew behind in Kenya.

[18] Officer Mjanes also asked Mr. Ali about his flight from Mogadishu and the lack of any documentation from the UNHCR dating back to his arrival in Kenya. Mr. Ali insisted that the families had visited the UNHCR offices on a number of occasions during their four years in Kenya, contradicting Mr. Karshe's revised claim that they had not attended at the UNHCR offices.

[19] Mr. Karshe was then invited back into the interview room. With both Mr. Karshe and Mr. Ali present, Officer Mjanes summarized his credibility concerns, explaining that he was not satisfied that either man was credible. He was also not satisfied as to the identities of any of their putative family members, based upon the misrepresentations as to some of the children's dates of birth and parentage.

[20] Officer Mjanes went on to state that he was not even certain that the two families were Somalis from Somalia. He advised them that if they were indeed Somali, that they should attend at the UNHCR offices and be registered as refugees. In the meantime, the applications for permanent residence were being refused based upon the applicants' lack of credibility.

Was Officer Mjanes *Functus*?

[21] According to the applicants, the assessment of applications for permanent resident visas for Convention refugees - whether inland or abroad - involve two discrete decisions: a risk determination and then a decision on health, security and criminality.

[22] The applicants argue that because Officer Sauvé had determined that they met the country of asylum class definition, that issue had already been decided. They say that this was a final decision made under section 147 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, which provides that an officer may "determine" whether a foreign national is a member of the country of asylum class. Once this determination was made, the applicants submit that it could not be revisited by Officer Mjanes because of the principle of *functus officio*.

[23] The doctrine of *functus officio* provides that once a decision-maker has done everything necessary to perfect his or her decision, he or she is then barred from revisiting that decision, other than to correct clerical or other minor errors. The policy rationale underlying this doctrine is the need for finality in proceedings: *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848, [1989] S.C.J. No. 102 (QL) at paras. 20-21.

[24] The Supreme Court also noted in *Chandler* that the doctrine of *functus officio* is not limited to judicial decisions, but can apply as well to decisions of administrative tribunals. However, it may be necessary to apply the doctrine in a more flexible and less formalistic fashion in the administrative tribunal context, where, for example, a right of appeal may exist only on a point of law. Indeed, the Court held that "[j]ustice may require the reopening of administrative proceedings

in order to provide relief which would otherwise be available on appeal": *Chandler*, above at para. 21.

[25] For the doctrine of *functus officio* to be engaged, it is necessary that the decision in issue be final. In the context of judicial decision making, a decision may be described as final when "... it leaves nothing to be judicially determined or ascertained thereafter, in order to render it effective and capable of execution, and is absolute, complete and certain ...": G. Spencer Bower & A.K. Turner, *The Doctrine of Res Judicata* 2d ed. (London: Butterworths, 1969) at 132, as cited in D.J.M. Brown & J. M. Evans, *Judicial Review of Administrative Action in Canada*, 2d ed., looseleaf (Toronto: Canvasback Publishing, 2009) vol. 3 at 12:6222.

[26] I am not persuaded that the doctrine of *functus officio* applies here, as Officer Sauvé had not reached a 'final decision' in relation to the applicants' application for permanent residence under section 11 of *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

[27] The determination that the applicants met the requirements of the country of asylum class was but one step in the process that could lead to the issuance of a permanent resident visa, which was what the applicants had applied for. There were still aspects of the application for permanent residence that remained to be determined in order to render Officer Sauvé's decision effective and capable of execution.

[28] Indeed, as the CAIPS notes state, Officer Sauvé's decision was merely a "selection decision". This Court has described such decisions as "an internal intermediate step on the road to a

final decision about a visa": *Patel v. Canada (Secretary of State)* (1999), 31 Imm. L.R. (2d) 120, [1995] F.C.J. No. 1410 (QL) at para. 6.

[29] A number of cases of this Court have determined that visa officers are not *functus officio* until a visa is issued or refused: *Brysenko v. Canada (Minister of Citizenship and Immigration)* (2000), 193 F.T.R. 129, 10 Imm. L.R. (3d) 257 at para. 6.

[30] Intermediate decisions made in the course of the assessment process are not 'final decisions' for the purposes of the *functus officio* doctrine. Indeed, a visa officer may reverse an initial or preliminary finding made in the context of an application for a permanent resident visa: see *Brysenko*, above; *Vimalenthirakumar v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 1181, [2010] F.C.J. No. 1481 (QL) at paras. 20-24; *Patel*, above at para. 6.

[31] Moreover, even if I were satisfied that Officer Sauvé had made a final decision (which I am not), I would nevertheless conclude that visa officers retain the discretion to reopen a visa application to do justice in unusual circumstances: see, for example, *Kheiri v. Canada (Minister of Citizenship and Immigration)* (2000), 193 F.T.R. 112, 8 Imm. L.R. (3d) 265 at para. 8; *Moumivand v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 157, [2011] F.C.J. No. 354 (QL) at para. 17; *Grigaliunas v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 87, [2012] F.C.J. No. 87 (QL).

[32] Visa officers must retain the discretion to look at previous decisions in order to ensure that immigrants are not inappropriately let into Canada: *Lo v. Canada (Minister of Citizenship and*

Immigration), 2002 FCT 1155, 229 F.T.R. 145 at para. 33. This policy concern applies equally in the refugee context where the identity of one of the applicants is at issue.

[33] There are strong policy considerations militating against recognizing several 'final' decisions leading up to the granting of a visa. Courts have recognized the practical reality that visa officers are often transferred before a visa is issued, and thus have held that "it is the visa officer who issues the visa who must satisfy himself or herself that the selection criteria have been met": *Brysenko*, above at para. 6; see also *Lo*, above at para. 32.

[34] A finding of *functus* would mean that a visa officer who has taken over the caseload of a departing officer could not review or alter an assessment made by another officer, even though a visa has not yet issued. In such cases, the new visa officer "could only act as [a] rubber stamp" for earlier assessments, even though it would be the new officer who would actually issue the visa: *Lo* at para. 32.

[35] It will, moreover, be in the interests of justice to correct mistakes where new information comes to light during the processing of an application that would call into question an applicant's admissibility to Canada: *Lo*, above at para. 33.

[36] Indeed, in *Chan v. Canada (Minister of Citizenship and Immigration)*, [1996] 3 F.C. 349, 114 F.T.R. 247 at para. 28, this Court recognized that new evidence demonstrating an applicant's inadmissibility may legitimately require the reconsideration of a visa application, *even after the visa has issued*.

[37] As a consequence, I am satisfied that Officer Mjanes did not err in law in reconsidering whether the applicants met the country of asylum class definition.

Did Officer Mjanes Err in Departing from the Findings of Officer Sauvé Without Providing Clear and Compelling Reasons for doing so?

[38] Relying upon the decision of the Federal Court of Appeal in *Canada (Minister of Citizenship and Immigration) v. Thanabalasingham*, 2004 FCA 4, [2004] 3 F.C.R. 572 at para. 11, the applicants argue that Officer Mjanes erred by failing to provide clear and compelling reasons for departing from Officer Sauvé's finding that the applicants met the country of asylum class definition.

[39] I have real concerns as to whether the decision in *Thanabalasingham* has any application here, given that it relates to successive detention reviews. It is not, however, necessary to decide this question as it is quite clear on the face of the record why Officer Mjanes revisited the issue of the applicants' membership in the country of asylum class.

[40] The applicants misrepresented the identity of two family members and provided implausible and contradictory reasons for so doing. They were also unable to provide a coherent explanation for their inability to produce any documentation supporting their claim to have escaped Somalia in 2007. It was therefore entirely reasonable for Officer Mjanes to doubt the truthfulness of their entire story, including the date and circumstances of their flight from Somalia. He did, moreover, provide clear and compelling reasons for his decision to revisit Officer Sauvé's earlier decision.

The Fairness Arguments

[41] The applicants submit that they were treated unfairly by Officer Mjanes in several ways. Where issues of procedural fairness arise, the task for the Court is to determine whether the process followed by the decision-maker satisfied the level of fairness required in all of the circumstances: see *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at para. 43.

[42] The applicants first argue that it was unfair for Officer Mjanes to interview each of the principal applicants in the absence of the other. They say that the evidence of each of the principal applicants was extrinsic evidence in the other's case with the result that it should have been disclosed to each applicant and an opportunity provided to respond to that evidence before a decision was made in relation to each application.

[43] I do not accept this submission. It is clear from Officer Mjanes' interview notes that he raised with each applicant his concerns regarding the lack of documentation, the identity of the family members, and the length of time the family had been in Kenya, and that he provided each principal applicant with the opportunity to respond to those concerns.

[44] It is also clear from the notes that Officer Mjanes provided Mr. Ali and Mr. Karshe with a summary of his credibility concerns. Neither applicant has provided an affidavit in support of his application, and there is thus nothing in the record to indicate that either applicant was unaware of the other's evidence or that they were unable to address Officer Mjanes' concerns. Nor have they produced any evidence that could have been provided to address the Officer's concerns.

[45] The applicants also contend that Officer Mjanes breached procedural fairness by refusing to give them an opportunity to submit further documentation to address the Officer's credibility concerns. After Officer Mjanes advised the applicants that their applications were being refused, they offered to try to obtain documents from the UNHCR or the DRA. The Officer declined to give them an opportunity to do so and confirmed the refusal of the applications.

[46] The applicants submit that the positive decision issued by Officer Sauvé created a legitimate expectation that a certain result would be reached in their case. In light of this, they say that Officer Mjanes ought to have accorded them more extensive procedural rights in this case than would otherwise be accorded, citing *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, [1999] S.C.J. No. 39 (QL) at para. 26. Specifically, the applicants argue that Officer Mjanes had a duty to allow them to provide documentation from the UNHCR or the DRA before reaching his decision.

[47] A review of Officer Mjanes' decision confirms that his concern was with the lack of documentation confirming that the two families actually arrived in Kenya from Somalia in 2007. Counsel for the applicants explained that the timing of the families' arrival in Kenya was important as there are Somali applicants who have lived in Kenya for many years who are now seeking to come to Canada claiming to have recently fled the violence in their country of origin.

[48] Given the nature of the Officer's concerns, registration documentation issued to the applicants by either the UNHCR or the DRA in 2011 could not have addressed Officer Mjanes' concerns. In these circumstances, I am not persuaded that the Court should intervene in this regard.

[49] Finally, the applicants contend that Officer Mjanes erred in issuing a collective or combined decision for both families, rather than assessing each of the principal applicant's applications on an individual basis. The joint nature of the decision is apparent when one considers that the reasons for the decision (the CAIPS notes) make no distinction between the applications, and use the plural throughout.

[50] The applicants argue that because of the way that Officer Mjanes conducted the interviews, it is impossible to know whether factors relevant to one case affected the disposition of the other case. Moreover, the Officer was obliged to respond to the individual circumstances of each case in assessing credibility, rather than assessing credibility on a group basis. Overlapping or similar facts do not entitle an officer to make a collective decision.

[51] I do not agree. The two applications were clearly interconnected, with common facts and issues. The families were related. They claim to have travelled together from Somalia to Kenya and to have lived together in Nairobi. It would, in my view, be unduly formalistic to require an officer to make two almost identical sets of CAIPS notes in such circumstances.

[52] The determinative question is not one of fairness, but instead of whether the reasons demonstrate "justification, transparency and intelligibility": *Dunsmuir*, above at para. 47. It is apparent from Officer Mjanes' notes that he assessed each application individually, and he provided clear reasons for rejecting each application. There is no basis for this Court's intervention.

Conclusion

[53] For these reasons, the applications are dismissed.

Certification

[54] Counsel for Mr. Karshe and Mr. Ali has proposed 13 questions for certification in this case.

[55] I would start by observing that in *Varela v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 145, [2010] 1 F.C.R. 129, at para. 28, the Federal Court of Appeal stated that section 74 of the *Immigration and Refugee Protection Act* refers to the certification "of 'a' serious question of general importance, not of 'one or more' serious questions of general importance". While recognizing that it is possible that a specific case could raise more than one question of general importance, the Court held that "this would be the exception rather than the rule". The Federal Court of Appeal clearly did not contemplate the certification of 13 questions in a single case.

[56] Five of the applicants' questions relate to the *functus* issue. As discussed earlier in these reasons, the law on this issue is well developed and well settled, and thus the questions proposed by the applicants are not appropriate for certification.

[57] The applicants' sixth question asks whether a person in Officer Mjanes' situation was obliged to give an applicant notice and an opportunity to respond before was reconsidering a determination that the person is a member of the humanitarian protected persons abroad class. This is not an appropriate question for certification. It would not be dispositive of this case in light of the

fact that Officer Mjanes did provide the applicants with notice of his concerns and an opportunity to respond to them.

[58] Question 7 is also not an appropriate question for certification as it is premised on there being a failure to apprise one applicant of the content of interviews with the other applicant. As noted earlier, there is nothing in the record before me to contradict the statement in Officer Mjanes' notes that he provided Mr. Ali and Mr. Karshe with a summary of his credibility concerns.

[59] Question 8 asks whether applicants are entitled to separate reasons which relate specifically to each applicant's case. I am not persuaded that this is a serious question of general importance given the fact-specific inter-relatedness of these particular applications. I also do not agree that question 9, which related to collective decision-making, should be certified, as it is premised on the decisions not being linked to the individual cases, a premise that is not borne out on the record.

[60] Question 10 and 11 relate to whether Officer Mjanes should have afforded the applicants the opportunity to obtain documents prior to refusing their application. Once again, I am not persuaded that this question should be certified as the Officer's decision not to afford the applicants with such an opportunity in this case was predicated on the precise nature of his concerns and the ability of the specific documents in issue to address those concerns.

[61] The applicants' final two questions relate to *de facto* family members. Neither question arises in this case. Officer Mjanes' concerns did not relate to the fact that Farhia Abdullahi

Mohamed and Abdihodan Mursal Farah were *de facto* family members rather than blood relatives. His concern was that the applicants had lied about the children's identities.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. These applications for judicial review are dismissed;

2. No serious question of general importance is certified; and

3. A copy of these reasons shall be placed on IMM-5652-11 and IMM-5650-11.

"Anne Mactavish"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5650-11 and IMM-5652-11
STYLE OF CAUSE:	MURSAL FARAH ALI ET AL v. MCI; and,
	ABDULLAH MOHAMED KARSHE ET AL v. MCI
PLACE OF HEARING:	Winnipeg, Manitoba
DATE OF HEARING:	May 16, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	MACTAVISH J.
DATED:	June 6, 2012

APPEARANCES:

David Matas	FOR THE APPLICANTS
Nalini Reddy	FOR THE RESPONDENT

SOLICITORS OF RECORD:

DAVID MATAS Barrister and Solicitor Winnipeg, Manitoba	FOR THE APPLICANTS
MYLES K. KIRVAN Deputy Attorney General of Canada Winnipeg, Manitoba	FOR THE RESPONDENT