Federal Court Cour fédérale

**Date: 20130306**

**Docket: IMM-5387-12**

**Citation: 2013 FC 234**

**Ottawa, Ontario, March 6, 2013**

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

**BETWEEN:**

**DALAL EL KAISSI**
**(aka DALAL FAHED EL KAISSI),**
**KHEIREDDINE KADDOURA, and**
**CHAYMAA RIM KADDOURA,**
**NASIMMA KADDOURA,**
**FAHED KADDOURA**
**(aka FAHED KHEIREDDI KADDOURA),**
**KHALED KADDOURA**
**(aka KALED KHEIRRED KADDOURA), and**
**KAMEL KADDOURA**
**(aka KAMEL KHEIREDDI KADDOURA),**
**By their litigation guardian,**
**KHEIREDDINE KADDOURA**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] of a decision of the Refugee Protection Division of the Immigration and Refugee Board [the Board], dated May 9, 2012, where the Board determined that the applicants are not Convention refugees or persons in need of protection.

### I. Background

[2] The adult applicants (Ms. Dalal El Kaissi and Mr. Kheireddine Kaddoura) and three of their children (Chaymaa Rim Kaddoura, Nassima Kaddoura and Kamel Kaddoura) are citizens of Lebanon. The adult applicants' other two children (Fahed Kaddoura and Khaled Kaddoura) are citizens of the United States of America (U.S.).

[3] In the summer of 1999, two masked men forced their way into the applicants' summer home in Al Hibaria, which was under Israeli military occupation. The men claimed to be fleeing the Israelis and wanted a place to hide. Mr. Kheireddine Kaddoura [the principal applicant, or PA] refused to allow the men to hide in his home and threatened to contact the Israeli officer who patrolled the area if they did not go away. The men told him that if he did not help them they would kill him and his family and accused him of collaborating with the Israelis. The PA believed these men were associated with Hezbollah because they had Shia accents and were fleeing the Israelis.

[4] In 2000, Hezbollah took control of the area around the applicants' summer home. The applicants went into hiding in northern Lebanon. Around that time, the PA's mother went to check on the summer home and found Hezbollah members occupying it.

[5] The applicants decided to flee to Benin on August 11, 2000.

[6] In 2005, the PA learned that his brother had been detained by Lebanese authorities and questioned regarding the whereabouts of the PA. Unable to remain in Benin and afraid to return to Lebanon, the applicants went to the U.S., where they arrived on March 13, 2005. Based on advice they had allegedly received, they decided not to claim asylum when they first arrived in the U.S., but proceeded to do so in 2008 when they faced removal proceedings.

[7] On September 2, 2009, the applicants came to Canada and claimed asylum at the Windsor, Ontario port of entry.

[8] The applicants' claim was initially rejected by the Board in a decision dated February 11, 2011. Justice David G. Near of this Court granted judicial review of this decision on the grounds that the incompetence of the applicants' counsel resulted in a breach of procedural fairness (*El Kaissi v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1234). He did, however, also find that the Board's assessment of the applicants' delay in pursuing a U.S. claim for refugee status was reasonable, as well as the Board's finding on the PA not establishing subjective fear of persecution.

[9] In February 2012, the PA's first cousin, with whom the PA is close, was arrested and charged with espionage for Israel against Lebanon.

[10] The PA also claims a warrant for his arrest was confirmed in 2007 and that there was still a warrant for his arrest as of March 20, 2012. The warrant, however, is non-specific as to what the reason for the warrant was and is for the PA's arrest.

## II. Issue

[11] The applicants raised the following issues:

A. Did the Board err in making its negative credibility finding?

B. Did the Board err by not confronting the PA with its concern over his work history?

C. Did the Board err in applying an incorrect standard of proof for a well-founded fear of persecution in its section 96 analysis?

## III. Standard of review

[12] The Board's credibility finding is a question of fact and is reviewable on the reasonableness standard (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 51 and 53 [*Dunsmuir*]).

[13] The standard of reasonableness is concerned with "the existence of justification, transparency and intelligibility within the decision-making and whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above, at para 47 and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59).

[14] The second issue, being one of procedural fairness, is reviewable on the correctness standard (*Canadian Union of Public Employees (CUPE) v Ontario (Minister of Labour)*, 2003 SCC 29 at para 100; *Sketchley v Canada (Attorney General)*, 2005 FCA 404 at para 54).

[15] The third issue is a question of law and is also reviewable on the correctness standard (*Mugadza v Canada (Minister of Citizenship and Immigration)*, 2008 FC 122 at para 10).

## IV. Analysis

### A. *Did the Board Err in Making its Negative Credibility Finding?*

[16] The Board held that it was not credible that the PA was not found while hiding in Northern Lebanon, considering that Lebanon is a small country. It is the applicants' position that the documentary evidence is clear that Hezbollah was based in the south in 2000, and therefore no adverse credibility finding was reasonable. The applicants also submit that the confirmation of the PA's arrest warrant issued in 2007, a date subsequent to the incidents alleged by the applicants in 2000, is consistent with the growth of Hezbollah's control over the Lebanese state subsequent to 2000 and evolving through to 2012.

[17] I find no evidence before the Board member that Hezbollah would have had the capability to find the PA while in hiding in northern Lebanon in 2000. I also find a lack of any evidence to show Hezbollah had sufficient political influence in Lebanon in 2000 to get an arrest warrant issued for the PA and that therefore the Board erred by drawing negative inferences in respect of each issue.

[18] Further, the fact that the Board relied on a non-existent "Exhibit C-4" in its credibility analysis and on facts not even before the Board in respect of the PA's need for medical and dental care, as a result of alleged Hezbollah's beatings, reinforces an apparent unreasonableness of the Board's findings with respect to the PA's overall credibility. This is not a mere clerical error.

*[19]* The Board also found that the delay in claiming asylum in the United States negatively impacted the PA's credibility. The applicants countered that the Board unreasonably minimized the PA's testimony that he did not claim asylum in the United States because he genuinely believed he would obtain permanent resident status by way of his son sponsoring him once his son turned 18 years old, relying on the decisions in *Papsouev v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 769 at para 20 and *Espinosa v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1324 at para 17). The PA's evidence is that although he did not contact a specialist in immigration law, he had sought out information from his "community", "friends" and "regular people" about whether he should seek asylum in the United States.

[20] It is not unreasonable for a person who has a well-founded fear or persecution to wait for what he or she believes to be a more certain route to permanent residency rather than filing an asylum claim. For the Board to find that it was "not at all" in the minds of the applicants to claim asylum in the United States, based on the evidence before the Board, was unreasonable. While this Court is not to "reweigh" the evidence before the Board, deference must be based on reasonable findings of fact.

B. *Did the Board Err by Not Confronting the PA with its Concern Over his Work History?*

[21] The applicants submit that the Board breached natural justice by failing to put to them its concern regarding the PA's work history which indicated he was working in Saika, Lebanon until August 2000, in contradiction to his testimony that he was hiding in northern Lebanon as of May 2000. The PA's position is that he could have explained this inconsistency if put to him given his "self-employment" and the fact his business continued to operate, even if he himself was in hiding.

[22] I am guided by the decision in *Lawal v Canada (Minister of Citizenship and Immigration)*, 2010 FC 558 at paras 16-17, in which this Court concluded the Board did not have a duty to confront the applicant with an inconsistency:

> 16 Counsel for the Applicant submitted that the Board breached procedural fairness by failing to offer the Applicant an opportunity to confront the apparent significant inconsistency in the fact that the Applicant was self-employed while he claimed to have been living in hiding. At the hearing, counsel added that being self-employed, the Applicant did not have to be physically present at his place of work and could therefore be working while hiding.
>
> 17 I agree with the Respondent that the Board had no duty to confront the Applicant with obvious discrepancies in his story. It is not entirely clear where the Applicant was kidnapped; his father does not mention this incident in his affidavit, and one of his friends indicated in his affidavit that he was abducted on the highway. Yet, a natural reading of the PIF narrative would lead one to believe the applicant was kidnapped for two days from the family home (as the Applicant seems to suggest by saying that the thugs "came back"). More importantly, I do not think it was unreasonable for the Board to conclude that the Applicant cannot be said to have been in hiding if he was able to live at the same place from mid-April to November and if he was able to work as a trader throughout that time. Whether he actually had to be physically present to conduct his business or not, the fact remains that this is where he was living without ever moving for more than six months.

[23] I also note the criteria set out by Justice Danièle Tremblay-Lamer in *Ngongo v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ 1627 at para 16:

> 16 In my view, regard should be had in each case to the fact situation, the applicable legislation and the nature of the contradictions noted. The following factors may serve as guidelines:
>
> 1. Was the contradiction found after a careful analysis of the transcript or recording of the hearing, or was it obvious?
>
> 2. Was it in answer to a direct question from the panel?
>
> 3. Was it an actual contradiction or just a slip?
>
> 4. Was the applicant represented by counsel, in which case counsel could have questioned him on any contradiction?
>
> 5. Was the applicant communicating through an interpreter? Using an interpreter makes misunderstandings due to interpretation (and thus, contradictions) more likely.
>
> 6. Is the panel's decision based on a single contradiction or on a number of contradictions or implausibilities?

[24] I conclude that in this case the inconsistency was obvious and arose from a discrepancy between the PA's declared work history and his PIF narrative, not from a careful analysis, and that the PA was represented by counsel. There was no breach of natural justice.

C. *Did the Board Err in Applying an Incorrect Standard of Proof for a Well-Founded Fear of Persecution in its Section 96 Analysis?*

[25] The applicants submit the Member erred by requiring "clear and convincing" evidence that the applicants are at risk at paragraph 33 of the decision:

> The panel does not have sufficient evidence in a clear and convincing fashion that the claimants' lives would be at risk based on being an alleged Israeli collaborator or based on the claimant's cousin's recent arrest and detention by the authorities.

[26] Moreover, the applicants argue that in substance as well as form the Board demanded an unreasonably high standard of proof. The applicants assert that while they cannot know for certain that they are at risk from Hezbollah in Lebanon, a serious possibility of risk can be inferred from their allegations.

[27] In *Adjei v Canada (Minister of Employment and Immigration)*, [1989] FCJ 67, [1989] 2 FC 680 (FCA), the Federal Court of Appeal addressed the legal test or standard of proof a refugee claimant must meet in asserting a fear of persecution. Justice MacGuigan stated the following regarding the proper interpretation of section 2(1)(a) of "Convention refugee" in the former Immigration Act, the forerunner to section 96(a) of the Act:

> However, the issue raised before this Court related rather to the well-foundedness of any subjective fear, the so-called objective element, which requires that the refugee's fear be evaluated objectively to determine if there is a valid basis for that fear.
>
> It was common ground that the objective test is not so stringent as to require a probability of persecution. In other words, although an applicant has to establish his case on a balance of probabilities, he does not nevertheless have to prove that persecution would be more likely than not. Indeed, in *Arduengo v Minister of Employment and Immigration* (1982) 40 NR 436, at 437, Heald J.A. said:
>
> > Accordingly, it is my opinion that the board erred in imposing on this applicant and his wife the requirement that they would be subject to persecution since the statutory definition supra required only that they establish "a well-founded fear of persecution". The test imposed by the board is a higher and more stringent test than that imposed by the statute.
>
> […]
>
> We would adopt that phrasing, which appears to us to be equivalent to that employed by Pratte J.A. in *Seifu v Immigration Appeal* Board (A-277-822, dated January 12, 1983):

> [I]n order to support a finding that an applicant is a convention refugee, the evidence must not necessarily show that he "has suffered or would suffer persecution"; what the evidence must show is that the applicant has good grounds for fearing persecution for one of the reasons specified in the Act.

> What is evidently indicated by phrases such as "good grounds" or "reasonable chance" is, on the one hand, that there need not be more than a 50% chance (i.e., a probability), and on the other hand that there must be more than a minimal possibility. We believe this can also be expressed as a "reasonable" or even a "serious possibility", as opposed to a mere possibility.

[28] In deciding whether the Board erred in applying the standard of proof for section 96 of the Act, the Board's reasons are to be taken as a whole (*IF v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1472 at para 24 and *Alam v Canada (Minister of Citizenship and Immigration)*, 2005 FC 4 at para 6).

[29] Although at paragraphs 38 and 39 of the decision the Board clearly and correctly stated the standard of proof applicable to a claim under section 97 of the Act, the Board did not address the correct standard with which to assess the section 96 claim.

[30] The Board twice alluded to the standard of proof it applied to the applicants' section 96 claim:

> The panel does not have sufficient evidence in a clear and convincing fashion that the claimants' lives would be at risk based on being an alleged Israeli collaborator or based on the claimant's cousin's recent arrest and detention by the authorities.

> …the panel inquired whether there is any update to their situation that would suggest in a forward looking analysis that their lives

> would be at risk from Hezbollah today if required to return to Lebanon.
>
> [Emphasis added]

[31] The test for the objective element of the applicants' claim is not whether they have suffered or would suffer persecution in Lebanon. The test is whether there is a serious possibility or reasonable chance of persecution. The Board did not apply the correct test for the well-foundedness of the applicants' subjective fear. Even taken as a whole, the Board's reasons indicate the applicants were put to an unduly onerous burden of proof.

[32] The Board therefore erred in applying an incorrect standard of proof to the applicants' well-founded fear of persecution in its section 96 analysis.

[33] No submissions were made with respect to the two applicants who are U.S. citizens, Fahed Kaddoura and Khaled Kaddoura, and given that they are U.S. citizens, I find no reason to grant the application in respect of either of them.

## JUDGMENT

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

1. The application for judicial review is granted with regards to the following applicants: Ms. Dalal El Kaissi, Mr. Kheireddine Kaddoura, Chaymaa Rim Kaddoura, Nassima Kaddoura and Kamel Kaddoura) and the matter is referred to a different Board member for redetermination;
2. The application for judicial review for the applicants Fahed Kaddoura and Khaled Kaddoura is dismissed;
3. No questions are certified.

"Michael D. Manson"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-5389-12 |
| **STYLE OF CAUSE:** | Kaissi et al. v. MCI |
| **PLACE OF HEARING:** | Toronto, Ontario |
| **DATE OF HEARING:** | March 4, 2013 |
| **REASONS FOR JUDGMENT AND JUDGMENT BY:** | MANSON J. |
| **DATED:** | March 6, 2013 |

**APPEARANCES:**

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|---|---|
| Daniel Kingwell | FOR THE APPLICANTS |
| Brad Gotkin | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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|---|---|
| Mamann, Sandaluk & Kingwell LLP<br>Toronto, Ontario | FOR THE APPLICANTS |
| William F. Pentney<br>Deputy Attorney General of Canada<br>Toronto, Ontario | FOR THE RESPONDENT |