

Date: 20090224

Docket: IMM-1120-08

Citation: 2009 FC 197

Toronto, Ontario, February 24, 2009

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

**TANWEER AHMED, SHAZIA SHAMS,
ARHUM AHMED, and BILAL AHMED**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

Introduction

[1] Mr. Tanweer Ahmed, his wife Shazia Shams and their sons Bilal Ahmed and Arhum Ahmed (collectively the “Applicants”) seek judicial review of the decision of Kristen Smyth, Enforcement Officer, Canada Border Services Agency (the “Enforcement Officer”) dated March 5, 2008. In this decision, the Enforcement Officer denied the Applicant’s request to defer their removal from Canada. A temporary stay of removal was granted on March 12, 2008, by Deputy Judge Frenette, allowing them to stay in Canada until July 30, 2008.

Background

[2] The Applicants, citizens of Pakistan, arrived in Canada on February 4, 2003 and filed claims for refugee protection on the same day. Their claims for refugee protection were ultimately denied on February 7, 2006. Leave for judicial review in that regard was denied on May 31, 2006.

[3] On September 15, 2006, the Applicants filed an application for permanent residence in Canada on humanitarian and compassionate grounds (“H & C application”). That application remains outstanding.

[4] On November 25, 2006, the Applicants filed a Pre-Removal Risk Assessment (“PRRA”) application. On January 15, 2008, they were advised that their application had been refused.

[5] On January 24, 2008, the Applicants received a Direction to Report with removal scheduled for March 11, 2008.

[6] On February 4, 2008, the Applicants requested a deferral of their removal. On February 19, 2008, Counsel for the Applicants asked when a decision on the deferral request could be expected. Counsel advised that he needed a speedy request due to his personal travel plans. Although Counsel was told on February 22, 2008 that a decision was expected before the end of the next week, no decision was received until March 4, 2008.

[7] Early on March 4, 2008, Counsel for the Applicants was advised that the deferral request had been refused. A written decision was faxed to Counsel later on March 4. On March 6, 2008, Counsel for the Applicants received the Enforcement Officer's Notes to File, together with an amended decision dated March 5, 2008. The Notes to File showed that the Enforcement Officer had consulted the Overseas Medical Services and relied upon information provided by that Service, without advising the Applicants of that information and without providing them with an opportunity to respond. The information related to the provision of adequate medical care and drug treatment, as well as the availability of prescription on medication.

[8] The Notes of the Enforcement Officer show that, among other things, she concluded that the Applicants had not shown that Ms. Shams would not have access to the medical services available in Pakistan.

[9] The Applicants argue that the Enforcement Officer erred by misinterpreting the evidence before her and also, that she breached the rules of procedural fairness by relying on extraneous material without having provided them with the opportunity to respond.

[10] The Minister of Citizenship and Immigration (the "Respondent") submits that the matter is moot and there are no grounds to justify the exercise of discretion to hear it on its merits.

Discussion and Disposition

[11] The matter is indeed moot since the Applicants received a temporary stay and the date of removal is passed; see *Baron v. Canada (Minister of Public Safety and Emergency Preparedness)* (2008), 69 Imm. L.R. (3d) 293. However, the question of procedural fairness is not subject to the principles of mootness; see *Level (Litigation Guardian) v. Canada (Minister of Public Safety and Emergency Preparedness)* (2008), 324 F.T.R. 71 (F.C.):

Both parties urged the Court not to dismiss this application for mootness. I do think the case is moot since, at this point of time as a result of the stay, there is no effective removal order. However, I agreed to consider this principle of procedural fairness since it is an important point of contention between the parties and is not moot in that respect. At the same time, I do not agree that this matter raises a serious issue of general importance that has not already been decided by the jurisprudence. In my view, the jurisprudence has established unequivocally that the duty of procedural fairness applies to important extrinsic evidence being relied upon by an administrative decision maker regardless of whether it is with respect to a decision not to defer the removal or to some other decision under the IRPA. For that reason, I will not certify any question in this application.

[12] I adopt and apply this same reasoning here. For this reason, this application for judicial review is allowed and the decision of the Enforcement Officer is quashed. There is no question for certification arising.

[13] I note that the Applicant has named the Minister of Citizenship and Immigration as the Respondent. The correct Respondent is the Minister of Public Safety and Emergency Preparedness and an Order will issue to amend the style of cause.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is allowed, there is no question for certification arising.

Further, the Court orders that this style of cause be amended to show the Minister of Public Safety and Emergency Preparedness as the Respondent.

“E. Heneghan”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-1120-08

STYLE OF CAUSE: TANWEER AHMED, SHAZIA SHAMS, ARHUM,
AHMED and BILAL AHMED v.
THE MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: JANUARY 27, 2009

**REASONS FOR JUDGMENT
AND JUDGMENT:** HENEGHAN J.

DATED: FEBRUARY 24, 2009

APPEARANCES:

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Mr. David Tyndale FOR THE RESPONDENT

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