Federal Court  Cour fédérale

Date: 20101117

Docket: IMM-1504-10

Citation: 2010 FC 1153

BETWEEN:

IBRAHIM HASAN ALBARAHMEH
BASIMA AHMAD AHMAD
(a.k.a. BASIMA AHMAD AB AHMAD)
OMAR ALBARAHMEH
AEH ALBARAHMEH
(a.k.a. AEH IBRAHIM HAS AL-BRAHMEH)

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

REASONS FOR JUDGMENT

PHELAN J.

I. INTRODUCTION

[1] The Immigration and Refugee Board (Board) rendered a decision on the merits of a case before the case was concluded. This is a most unusual case – fortunately. The Court and the parties have been unable to cite any similar cases in the context of administrative hearings.

II. BACKGROUND

[2] The Applicants are a family of four; the male Applicant, his wife the female Applicant, and their children who are citizens of Jordan. In a decision dated March 3, 2010, the Board rejected all four Applicants' claims for refugee protection.

[3] The male Applicant, on his own, was excluded from consideration by virtue of Article 1F(a) of the Convention because he was a member of the Jordanian Public Security Directorate, an organization responsible for widespread and systematic torture, mistreatment, arbitrary arrest, detention and murder.

> 1F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

The female Applicant, whose case was the foundation for the family's claim for refugee status and protection, failed to rebut the presumption of state protection in respect to all four Applicants. The Board's final conclusion was:

> Having found the claimants lack credibility and that they have failed to rebut the presumption that states can protect their citizens, I find that there is no crecible *(sic)* basis for the claim.

[4] The critical problem with this decision is that the evidence and argument had not been concluded. A further hearing was scheduled and, without notice to anyone, the Board rendered its final decision part way through the process.

[5] The four claims (one for each Applicant) were joined for purposes of evidence and argument.

[6] The hearing of these joined refugee claims was conducted on June 25, 2009 and October 23, 2009. A further hearing date was required and the parties received a Notice to Appear setting the date for the third hearing for 1 p.m. on December 23, 2009.

[7] At this point in the process the evidence on exclusion was complete and written submissions on this exclusion issue had been filed. The female Applicant was testifying as to the issue of inclusion of the four Applicants as refugees.

[8] On December 23, 2009, the parties were advised that due to the Member's illness, that day's hearing was cancelled and a new hearing date would be set.

[9] Without any further word from the Board, the parties received the negative decision dated March 3, 2010.

III. ANALYSIS

[10] The only real issue raised is whether the Applicants were denied procedural fairness. The Respondent has conceded the point in respect to the female Applicant and the two children. However, the Respondent maintains that the refugee finding against the male Applicant can stand because the decision in respect of the exclusion issue is reasonable and there was no unfairness in

respect to the portions of the hearing that dealt with that issue. Correspondingly, the Respondent submits that the Court should sever the decision and conclude that the exclusion finding can stand but that the inclusion finding can be quashed.

[11] As this is an issue of natural justice/procedural fairness, the standard of review is correctness (*Dunsmuir v. New Brunswick*, 2008 SCC 9). There is no question that the Court may sever the decision under review and uphold part of that decision as a matter of discretion. This is clear from the *Federal Courts Act* and such decisions as *Xie v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 250 and *Alvarez v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 321.

[12] The claims of the four Applicants were joined pursuant to Rule 49(1) of the *Refugee Protection Division Rules* SOR/2002-228. The Board itself considered the family's refugee claim as a whole in respect to inclusion; thus the failure to complete the hearing before rendering judgment is fatal to the totality of the inclusion finding. The Respondent concedes as much in respect to some of the Applicants. However, it is just as fatal an error to the inclusion issue for the male Applicant.

[13] The real issue is whether the Court should allow the exclusion issue to be severed and allowed to stand. With some reluctance, I am of the view that it ought not to be severed.

[14] While the evidence and submissions on exclusion were largely over, the Board remained seized with the matter. There is nothing in the Certified Tribunal Record which suggests that the matter was concluded with finality.

[15] The male Applicant contends that he did not think that the case was closed – not a startling position. Of significance is the fact that Minister's counsel did not think that the exclusion issue was necessarily concluded, either.

[16] The Minister's counsel, who was present at the hearing to deal with the exclusion issue, left at the beginning of the inclusion part of the case with the caution to the Board that he was to be called back if anything related to exclusion arose.

[17] There is no question that the parties legitimately expected that a new hearing date, following the December 23 cancellation, would be set and would then occur. The procedural fairness raised is that of "legitimate expectation", the principles of which have been expressed as follows:

> **19** The issue raised by the first question can be disposed of rapidly. Section 190 of the IRPA is clear and unambiguous. It provides that if an application is pending or in progress on June 28, 2002, the IRPA applies without condition. The doctrine of legitimate expectations is a procedural doctrine which has its source in common law. As such it does not create substantive rights and cannot be used to counter Parliament's clearly expressed intent (*Canada (Minister of Employment and Immigration) v. Lidder*, [1992] 2 F.C. 621 (C.A.), at pages 624, 625 and 632).
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> *dela Fuente v. Canada (Minister of Citizenship and Immigration) (F.C.A.)*, 2006 FCA 186
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> **26** Fourth, the legitimate expectations of the person challenging the decision may also determine what procedures the duty of fairness requires in given circumstances. Our Court has held that, in Canada, this doctrine is part of the doctrine of fairness or natural justice, and that it does not create substantive rights: *Old St. Boniface*, *supra*, at p. 1204; *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, at p. 557. As applied in Canada, if a legitimate expectation is found to exist, this will affect the content of the duty of

> fairness owed to the individual or individuals affected by the decision. If the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness: *Qi v. Canada (Minister of Citizenship and Immigration)* (1995), 33 Imm. L.R. (2d) 57 (F.C.T.D.); *Mercier-Néron v. Canada (Minister of National Health and Welfare)* (1995), 98 F.T.R. 36; *Bendahmane v. Canada (Minister of Employment and Immigration)*, [1989] 3 F.C. 16 (C.A.). Similarly, if a claimant has a legitimate expectation that a certain result will be reached in his or her case, fairness may require more extensive procedural rights than would otherwise be accorded: D. J. Mullan, *Administrative Law* (3rd ed. 1996), at pp. 214-15; D. Shapiro, "Legitimate Expectation and its Application to Canadian Immigration Law" (1992), 8 *J.L. & Social Pol'y* 282, at p. 297; *Canada (Attorney General) v. Human Rights Tribunal Panel (Canada)* (1994), 76 F.T.R. 1. Nevertheless, the doctrine of legitimate expectations cannot lead to substantive rights outside the procedural domain. This doctrine, as applied in Canada, is based on the principle that the "circumstances" affecting procedural fairness take into account the promises or regular practices of administrative decision-makers, and that it will generally be unfair for them to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights.
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> *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817
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> **123** The interests underlying the legitimate expectations doctrine are the non-discriminatory application in public administration of the procedural norms established by past practice or published guidelines, and the protection of the individual from an abuse of power through the breach of an undertaking. These are among the traditional core concerns of public law. They are also essential elements of good public administration. In these circumstances, consultation ceases to be a matter only of political process, and hence beyond the purview of the law, but enters the domain of judicial review.
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> *Apotex Inc. v. Canada (Attorney General)*, [2000] 4 F.C. 264

[18] The male Applicant had a legitimate expectation that no decision would be made until all the evidence was in, on all issues.

[19] The right to procedural fairness is not a right to form over substance and there are times when a court will excuse a procedural fairness error (*Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202). This is not one of those times.

[20] There was the potential that matters could arise in the third hearing which would affect the exclusion analysis. The Minister's counsel even contemplated that possibility, yet the Board's actions precluded that possibility from ever being able to occur. Therefore, there is substance to the procedural fairness issue foreclosed.

[21] Further, the Court cannot accept that the Member intended to render the decision on a partial record. It must have been an error and since it did not reflect the Board's true intent (even if the Board intended the exclusion result), the decision ought not to stand. The administration of justice requires that decisions be complete and express the true and whole intent of the decision maker.

[22] Lastly, more harm would be done to the parties, the administration and the public if a decision rendered in such a flawed manner is allowed to stand than if the matter is subject to a new determination by a new member. The facts will not change, the actions of the Jordanian Public Security Directorate and the male Applicant's involvement are largely substantiated. Perspectives and arguments may change but it is preferable, in the interests of justice, to have the whole of the truth exposed than to allow a flawed decision to stand.

IV. CONCLUSION

[23] Therefore, this judicial review will be allowed, the Board's decision will be quashed in its entirety and the matter remitted for a new determination before another panel which can accept as evidence of exclusion the evidence received in the earlier proceeding with leave to admit further evidence and argument as the panel determines.

[24] The parties shall have seven (7) days from the date of these Reasons to file submissions on a certified question.

"Michael L. Phelan"
Judge

Ottawa, Ontario
November 17, 2010

FEDERAL COURT

SOLICITORS OF RECORD

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