

Federal Court



Cour fédérale

Date: 20110421

Docket: IMM-1278-10

Citation: 2011 FC 489

Ottawa, Ontario, April 21, 2011

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

**ASH SHAYMAA ES SAYYID and
AHMED ALI BASSAM**

Applicants

and

**THE MINISTER OF CITIZENSHIP &
IMMIGRATION and THE MINISTER OF
PUBLIC SAFETY & EMERGENCY
PREPAREDNESS**

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 02001, c 27 (the Act) for judicial review of a decision of the Director of Case Management, Case Management Branch, Citizenship and Immigration Canada (the Director), dated

February 3, 2010, wherein the Director found that the principal applicant, Ahmed Ali Bassam, was inadmissible to Canada as a person described in paragraph 36(1)(c) of the Act.

[2] The applicants request an order quashing the decision and remitting the matter back for re-determination by a differently constituted panel.

Background

[3] Ahmed Ali Bassam (the principal applicant) was born on September 30, 1975 in Jordan and is of Palestinian origin. He is married to Ash Shaymaa Es Sayyid who is a Convention refugee of Egyptian nationality and a permanent resident in Canada.

[4] In 1997, the principal applicant, accompanied by his brother, entered Germany using the alias of Ahmed Alqatanani. He applied for asylum in Germany which was refused.

[5] In Germany, the principal applicant abused drugs and alcohol. In April 2001, the he was convicted of gang fraud in Hanover, Germany and received a two year open sentence which he served only on weekdays.

[6] On February 11, 2002 an arrest warrant was issued against the principal applicant for ten additional charges of gang-type fraud. The principal applicant fled Germany without completing his two year sentence for the above offence. He entered Canada on May 11, 2002.

[7] In March 2005, the principal applicant was found not to be a Convention refugee or person in need of protection.

[8] In Canada, the principal applicant married and had three children. He stopped drinking and taking drugs, attended English classes, volunteered at a community centre and started his own business installing garage doors. He is the sole supporter of his family through the income he earns with this business.

[9] In March 2006, the principal applicant applied for permanent residence as the dependent of his wife. This application was separated from his wife's application in November 2007. Ms. Sayyid acquired permanent residence on March 20, 2008.

[10] On March 23, 2009, the principal applicant's application was forwarded to Citizenship and Immigration Canada (CIC) National Headquarters to assess a possible humanitarian and compassionate (H&C) waiver of criminal inadmissibility under subsection 25(1) of the Act. In July 2009, the Director requested in a letter to the principal applicant that he provide his previous aliases, a list of the offences he previously committed, copies of his convictions and copies of the statutes under which he was convicted. The Director advised the principal applicant that she may consider recent and current country condition information from the Immigration and Refugee Board (the Board) documentation centre in making her decision.

Director's Decision

[11] A CIC immigration officer rejected the principal applicant's application for permanent residence as a member of the family class based on the Director's report on the principal applicant's inadmissibility.

[12] The Director found that the principal applicant was convicted of gang fraud contrary to section 263 of the *German Criminal Code*. The Director found that the Canadian offence of fraud contrary to subsection 380(1) of the *Criminal Code of Canada*, RSC 1985, c C-46 in combination with subsection 467.12(1) was an equivalent offence.

[13] The Director found that the principal applicant's criminality leading to this conviction was not an isolated event. A German arrest warrant states that the principal applicant is wanted for ten counts of criminal acts including: carrying on a business with intent to gain illegal advantage of assets, causing damage to the property of another by false pretences creating errors and acting as a member of a gang, which had banded together for the continuous commitment of fraud. In addition, the Director relied on an email from Interpol dated October 1, 2007 which stated that under different aliases, between 1997 and 2002, the principal applicant came to the attention of authorities for theft in department stores, gang-type fraud, damage to property and suspected attempted homicide. In addition, this email stated that the principal applicant paid fines and served alternative prison sentences for theft, attempted theft and gang-type fraud.

[14] The Director found that an email from Interpol dated August 12, 2008 stated that Germany would not seek the extradition of the principal applicant.

[15] The Director noted the explanation given for the principal applicant's criminal behaviour was problematic because counsel omitted the fact that the principal applicant's brother was in Germany and an important player in the gang fraud. In addition, the principal applicant did not provide the Director with any submissions on the events leading to the commission of the offences noted above. As such, the Director found that there was nothing to contradict the information on file from Interpol and the German authorities.

[16] The Director found that the principal applicant was not able to apply for formal rehabilitation because he did not complete his sentence in Germany and there continue to be pending charges against him. As for informal rehabilitation, the Director acknowledged the psychologist report stating that the principal applicant is stable and settled in Canada and is not using drugs or alcohol. In addition, the psychologist report stated that the principal applicant could not support his family if he were deported. The Director found that the report was based on one interview with the principal applicant and appeared to have been commissioned by counsel for the purpose of bolstering the H&C application. The Director also found that the psychologist's comments relied on country condition information about Jordan which was not within the psychologist's expertise to assess. As such, the Director gave the report little weight. She did, however, find that the principal applicant has made real efforts to establish himself financially and in the community.

[17] The Director considered the principal applicant's family and establishment in Canada in assessing the H&C considerations. She found that separating the principal applicant from his family was serious as this would remove the sole source of family support. However, she found that the

children are young enough that they could adapt to a new culture if they were to accompany their father to Jordan. The Director also found that while Ms. Sayyid may have little desire to return to the Middle East, she is familiar with the culture, religion and language and while it would be within her rights to remain in Canada with the children, it would be reasonable for her to accompany the principal applicant and keep the family unit intact. In addition, based on Immigration and Refugee Board (the Board) documentation, the Director found that a foreign woman married to a Jordanian man would qualify for Jordanian citizenship after a period of residency. The option for the family to join the principal applicant in Jordan seriously diminishes the certainty that the refusal of permanent residence would create a permanent separation between family members.

[18] The Director found that the principal applicant had not raised any particular areas of risk should he return to Jordan. The principal applicant would be able to re-establish himself in Jordan without undue hardship as Jordan is not experiencing significant conflicts or humanitarian crises and is generally a safe place to live and raise children.

[19] The Director concluded that the principal applicant's past criminality was serious and not isolated. While the principal applicant did not commit further criminal offences in Canada, he did misrepresent his identity at the port of entry and provided different versions of events in his personal information form and before the Refugee Protection Division of the Board. The principal applicant's establishment in his personal and professional life did not override the nature and severity of his past acts.

Issues

[20] The applicants submitted the following issues for consideration:

1. Whether the officer erred in law in ignoring relevant matters.
2. Whether the officer erred in law in engaging in speculation.
3. Whether the officer erred in law in determining that there was nothing to contradict the information received from Interpol or the German authorities.
4. Whether the officer erred in law in taking into account irrelevant matters.
5. Whether the officer erred in law in taking into account and/or relying on documents which she failed to disclose to the applicants.
6. Whether the officer breached the duty of fairness in failing to provide clear reasons.

[21] I would rephrase the issues as follows:

1. What is the appropriate standard of review?
2. Did the Director err by not considering the totality of the evidence or basing her decision on findings of fact made without regard to the material before her?
3. Did the Director breach the duty of fairness owed to the applicants by not disclosing all the evidence upon which she relied?
4. Were the best interests of the Canadian born children properly assessed?

Applicants' Written Submissions

[22] The applicants submit that the Director erred by ignoring relevant factors. Specifically, the Director ignored the submission that Ms. Sayyid had no desire to return to the Middle East. The

Director failed to consider the hardship that Ms. Sayyid and her children would experience if their father had to remain abroad permanently. The Director also ignored the fact that Ms. Sayyid would lose her residency in Canada if she accompanied her husband to Jordan. She ignored the purpose of H&C considerations which is family unity within Canada. Finally, the Director ignored the possibility of rehabilitation, beyond formal rehabilitation, in that the principal applicant has established a business, married and had children and regrets his past actions.

[23] The applicants submit that the Director breached the duty of fairness by failing to provide clear reasons directly indicating what she accepted or did not accept from the psychologist report.

[24] The applicants also submit that the Director engaged in speculation when finding that the principal applicant fled Germany and his prison sentence to avoid facing the new charges against him.

[25] The applicants further submit that the Director erred in concluding that there was no evidence before her to contradict the Interpol criminal allegations. The principal applicant had already disclosed his involvement in telephone fraud in the past and these previous admissions were before the Director.

[26] Finally, the applicants submit that the Director erred by relying on undisclosed information; namely, a note from Interpol that extradition would not be sought and the documentation about Jordan's country conditions and the status of foreign women married to Jordanian citizens.

Respondents' Written Submissions

[27] The respondents submit that the Director reviewed and considered all of the applicants' submissions before reaching her determination. She did not ignore relevant facts. The Director considered the effect of removal on the children and was alert, alive and sensitive to their best interests. She acknowledged that the principal applicant's removal would cause hardship to the family and that Ms. Sayyid did not want to return to the Middle East. She acknowledged that the children have a legal right to remain in Canada, but that they do not have a right to have their father remain with them in Canada. The Supreme Court in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, made it clear that the best interests of the children is not alone determinative. The Director found that refusing the application would not automatically amount to permanently separating the family because Ms. Sayyid and the children could move to Jordan to keep the family unit intact. The decision whether to take the children with him upon removal was the principal applicant's own to make.

[28] The Director also considered the principal applicant's rehabilitation. She gave little weight to the psychologist report presented by the principal applicant because it was based on one meeting and was commissioned for the purpose of the application. She did consider the principal applicant's change in lifestyle that he had stopped taking drugs and alcohol and was happily married with a full time job and children.

[29] The respondents also submit that it was open to the Director to determine that the principal applicant would have known of the new charges at the time he escaped from prison. The arrest

warrant for the new charges was issued one week before he escaped. Moreover, the principal applicant has not asserted that the new charges were baseless.

[30] The respondents further submit that the Director did not err in finding that no evidence contradicted the Interpol evidence. At no time did the principal applicant make submissions denying the criminality set out by Interpol, even when specifically asked to provide evidence on it.

[31] The respondents submit that there was no duty on the Director to disclose the Interpol note regarding extradition. The applicants have not shown that the non-disclosure prejudiced the principal applicant in any way. Regarding the information about Jordan's country conditions, the principal applicant was directly notified that the Director may consider such information.

[32] Consequently, given the totality of the evidence according to the respondents, the Director chose not to use her discretion to approve the application on H&C grounds.

Analysis and Decision

[33] **Issue 1**

What is the appropriate standard of review?

Failure to disclose relevant documents is an issue of procedural fairness and is reviewable on the correctness standard (see *Allou v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1025 at paragraph 18).

[34] Concerning the other issues, subsection 25(1) of the Act allows persons seeking to become permanent residents of Canada who are otherwise inadmissible to be exempted from those requirements of the Act if the Minister is of the opinion that it is justified on humanitarian and compassionate grounds, taking into account the best interests of any children directly affected or public policy considerations. The H&C decision making process is highly discretionary and these decisions require a considerable level of deference when being reviewed on the standard of reasonableness (see *Baker* above; *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190; *Quiroa v Canada (Minister of Citizenship and Immigration)* 2007 FC 495 at paragraph 19).

[35] In reviewing the Board's decision using a standard of reasonableness, the Court should not intervene on judicial review unless the Board has come to a conclusion that is not transparent, justifiable and intelligible and within the range of acceptable outcomes based on the evidence before it (see *Dunsmuir* above, at paragraph 47; *Khosa v Canada (Minister of Citizenship and Immigration)*, 2009 SCC 12, [2009] 1 SCR 339 at paragraph 59).

[36] At the hearing, the applicants primarily dealt with two issues: the best interests of the Canadian born children and the treatment of the principal applicant's rehabilitation.

[37] **Issue 4**

Were the best interests of the Canadian born children properly assessed?

I wish to first deal with the analysis relating to the best interests of the Canadian born children. In any analysis of the best interests of the children, regard must be given as to what their situation would be if their father was removed and their mother stayed with them in Canada. In the

present case, the Director dealt with the situation if the mother and children went to Jordan with the principal applicant. My review of the Director's decision leads me to believe that the Director did not adequately direct her mind to the situation of the children if they were to remain in Canada with their mother who is a permanent resident of Canada. The Director's decision contains the following with respect to the children if their father is removed from Canada:

Separating Mr. Ali Bassam from his wife and children and taking away the sole source of financial support for the family are serious considerations in Mr. Ali Bassam's favour. However, this family appears to have other options should Mr. Ali Bassam be removed from Canada.

There is no further discussion or details relating to the children if they remain in Canada. I am of the view that the analysis of the best interests of the children if they were to remain in Canada was not sufficient.

[38] I am of the view that the two alternatives should have been addressed adequately in order to make a proper decision concerning the best interests of the children. I cannot know whether the Director's decision might have been different had this been done.

[39] As a result, the application for judicial review must be allowed and the matter referred to a differently constituted tribunal for redetermination.

[40] Because of my finding on this issue, I need not deal with the remaining issues.

[41] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

[42] **IT IS ORDERED that** the application for judicial review is allowed and the matter is referred to a differently constituted tribunal for redetermination.

“John A. O’Keefe”

Judge

ANNEX

Relevant Statutory Provisions

Immigration and Refugee Protection Act, S.C. 2001, c. 27

36.(1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for	36.(1) Emportent interdiction de territoire pour grande criminalité les faits suivants :
...	...
(c) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.	c) commettre, à l'extérieur du Canada, une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans.
72.(1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.	72.(1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.
96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(a) is outside each of their countries of nationality and is unable or, by reason of that	a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette

fear, unwilling to avail themselves of the protection of each of those countries; or	crainte, ne veut se réclamer de la protection de chacun de ces pays;
(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.	b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.
97.(1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally	97.(1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :
(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or	a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;
(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if	b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :
(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,	(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,
(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,	(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,
(iii) the risk is not inherent or incidental to lawful sanctions,	(iii) la menace ou le risque ne résulte pas de sanctions

unless imposed in disregard of accepted international standards, and	légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

German Criminal Code

“Criminal Code in the version promulgated on 13 November 1998, Federal Law Gazette [Bundesgesetzblatt] I p. 3322, last amended by Article 3 of the Law of 2 October 2009, Federal Law Gazette I p. 3214”

Chapter Twenty-Two: Fraud and Embezzlement

263. (1) Whosoever with the intent of obtaining for himself or a third person an unlawful material benefit damages the property of another by causing or maintaining an error by pretending false facts or by distorting or suppressing true facts shall be liable to imprisonment of not more than five years or a fine.

...

(3) In especially serious cases the penalty shall be imprisonment from six months to ten years. An especially serious case typically occurs if the offender

1. acts on a commercial basis or as a member of a gang whose purpose is the continued commission of forgery or fraud;

Criminal Code, R.S., 1985, c. C-46

380.(1) Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, defrauds the public or any person, whether ascertained or not, of any property, money or valuable security or any service,	380.(1) Quiconque, par supercherie, mensonge ou autre moyen dolosif, constituant ou non un faux semblant au sens de la présente loi, frustre le public ou toute personne, déterminée ou non, de quelque bien, service, argent ou valeur :
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(a) is guilty of an indictable offence and liable to a term of imprisonment not exceeding fourteen years, where the subject-matter of the offence is a testamentary instrument or the value of the subject-matter of the offence exceeds five thousand dollars; or

a) est coupable d'un acte criminel et passible d'un emprisonnement maximal de quatorze ans, si l'objet de l'infraction est un titre testamentaire ou si la valeur de l'objet de l'infraction dépasse cinq mille dollars;

(b) is guilty

b) est coupable :

(i) of an indictable offence and is liable to imprisonment for a term not exceeding two years, or

(i) soit d'un acte criminel et passible d'un emprisonnement maximal de deux ans,

(ii) of an offence punishable on summary conviction,

(ii) soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire,

where the value of the subject-matter of the offence does not exceed five thousand dollars.

si la valeur de l'objet de l'infraction ne dépasse pas cinq mille dollars.

467.12(1) Every person who commits an indictable offence under this or any other Act of Parliament for the benefit of, at the direction of, or in association with, a criminal organization is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

467.12(1) Est coupable d'un acte criminel et passible d'un emprisonnement maximal de quatorze ans quiconque commet un acte criminel prévu à la présente loi ou à une autre loi fédérale au profit ou sous la direction d'une organisation criminelle, ou en association avec elle.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-1278-10

STYLE OF CAUSE: ASH SHAYMAA ES SAYYID and
AHMED ALI BASSAM

- and -

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

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: November 3, 2010

**REASONS FOR JUDGMENT
AND JUDGMENT OF:** O'KEEFE J.

DATED: April 21, 2011

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