

Kasim v. Canada (Minister of Citizenship and Immigration), 2002 FCT 1087 (CanLII)

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BETWEEN:

MANSOUR KASIM EL KASIM, FAWZIEA HASSAWI,
ABDUL RAHMAN EL KASIM, AHMAD MASOUR EL KASIM,
MARIAM EL KASIM, BADER EL KASIM,

Applicants,

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION,

Respondent.

REASONS FOR ORDER

LAYDEN-STEVENSON J.

[1] The applicants seek judicial review of the decision of the Convention Refugee Determination Division of the Immigration and Refugee Board (the CRDD), now the Refugee Protection Division (RPD), dated November 27, 2001, which determined that the applicants are not Convention refugees.

[2] The principal applicant, Mansour Kasim El Kasim, is a fifty-year-old citizen of Iraq. He lived in Iraq until 1970 when his application for university and for a scholarship to study abroad were rejected because of his refusal to join the Ba'ath Party. At that time, he moved to Kuwait where he remained until September 15, 2000, when he and his family left Kuwait for Canada where they arrived on September 20th. He did not serve in the Iraqi military before moving to Kuwait. In 1980,

the principal applicant married the female applicant, Fawzicia Al Hassawi, a Kuwaiti citizen. They have four children, namely Abdul, Ahmad, Mariam and Bader El Kasim, all of whom are Iraqi citizens. The laws of Kuwait provide that a woman's right to citizenship is limited. It is acquired through her father or husband and may not be passed on to her offspring or her spouse.

[3] The principal applicant lived, worked and raised his family in Kuwait where he was granted a residential permit that had to be renewed regularly. The record is not clear with respect to the frequency of renewal but it appears that the permit would expire after a year or two. The principal and female applicants lived, worked and raised their family in Kuwait, without incident, until the Iraqi invasion on August 2, 1990. Following the invasion, the principal applicant was not able to work in Kuwait. There are various allegations of his having been arrested, imprisoned and tortured during and subsequent to the invasion. It is not necessary, for purposes of these reasons, to detail the history of abuse alleged by the applicant since the decision of the CRDD and the outcome of the application for judicial review do not turn on those allegations. Suffice it to say that, following liberation of Kuwait on February 26, 1991, there were allegations of harassment and abuse but the critical issue was the status of the family in Kuwait. The evidence was that, with the exception of the female applicant, the El Kasim family could not obtain residency rights in Kuwait. The claim for Convention refugee status in Canada was based on inability and unwillingness to return to Iraq due to political opinion.

[4] The CRDD, after expressing dissatisfaction with the evidence and testimony surrounding their Kuwaiti status, defined the issue as follows:

. . . [F]or purposes of these claims, the panel has . . . determined on a balance of probabilities, that the male claimant and his children are citizens of Iraq, and that Iraq is the only country where they have an automatic right of return. The panel will examine whether their fear of return to Iraq is well-founded.

[5] The panel made four findings in support of its ultimate conclusion that the applicants do not have a well-founded fear of persecution in Iraq. One of those findings is conceded by the respondent to be in error, but since it is not material to the outcome, I do not propose to deal with it further. I find no basis upon which to intervene in the panel's findings with respect to the alleged execution of the applicant's brothers or with respect to the applicant's alleged participation in the theatre production mocking Saddam Hussein. It is the one remaining finding that presents difficulty.

[6] The applicant claimed political opinion based on his refusal to serve in the military. For ease of reference, the finding of the CRDD in this respect is reproduced in its entirety.

The claimant stated that he did not respond to the call of the Iraqi government, when they wanted the Iraqis in Kuwait to return to Iraq to enlist in the army, and will be prosecuted as a result; he was morally opposed to serving in the Iraqi army, and held the same opinion with respect to his sons. His adult son Ahmad endorsed the views of his father, and stated that he could not afford to, nor did he believe in, buying out of military service in Iraq.

The panel has accepted above that the claimant and his children are citizens of Iraq. According to documentary evidence, military service for all males over the age of 18 years is compulsory in Iraq, but that one could make a payment in lieu of military service. The claimants may have conscientious objection to fighting for the Iraq army; however, in the panel's view, buying out of such service

cannot be equated with serving in the army. The panel finds that buying out is a reasonable compromise between opting out of direct service, while also fulfilling the requirement of a law of general application in Iraq.

[7] The applicant's evidence regarding "buying out" was stated in his personal information form (PIF) as follows:

When the regime of Saddam announced in 1983 that every Iraqi citizen who does not serve the military service, should pay an amount in cash in lieu I did not pay this amount as this would help the regime that I abhor.

[8] There was also reference in the PIF that on the day of the Iraqi invasion of Kuwait, all actors were ordered to report to Iraqi TV. The applicant did not report because he refused to co-operate with the Iraqi government. The applicant's oral evidence in this respect was consistent with the PIF (Transcript: page 42).

[9] The applicant additionally gave evidence that the Iraqi government is a terrorist and dictatorship regime and that the best example of its behaviour was its attack on Kuwait. He described Saddam Hussein as a criminal racist who destroyed Kuwait, destroyed Iraq, killed his own people, killed Kurdish people, killed Kuwaiti people - he is not the right person to co-operate with (Transcript: page 42). In response to questioning from the panel as to why Iraq would be interested in him now, the applicant answered because he had refused to join the army and had refused to pay money to subsidize the army (Transcript: page 43). He further testified

that history displays that Saddam killed the Kurdish people in the north of Iraq and killed the Shia in the south of Iraq and that he (the applicant) refused to co-operate with the Iraqi government, with Saddam Hussein's regime (Transcript: page 45). The applicant's eldest son testified that he was not willing to serve in the Iraqi army nor was he willing to pay money to a place like Iraq (Transcript: page 74).

[10] The documentary evidence before the CRDD revealed that Iraqis who fail to serve in the military are subject to life imprisonment and those who criticize or fail to support Saddam Hussein are subject to punishment, which can include the death penalty. Although the panel viewed "buying out" as distinct from "serving", it appears to me that it is a reasonable inference that if one refuses to pay, the ultimate result is that the person has not served. The panel did not address this question.

[11] The seminal case regarding what has been termed "conscientious objection" is *Zolfagharkhani v. Canada (Minister of Employment and Immigration)*, 1993 CanLII 2971 (FCA), [1993] 3 F.C. 540 (C.A.), which articulates the analytical framework for determination of the issue of whether refusal to comply with a law of general application would result in prosecution or persecution by the state in question.

[12] In my view, the question to be addressed, in the circumstances of this particular matter, is whether the applicant's opposition to payment constituted a political act or opinion which could result in persecution within the meaning of the Convention. The CRDD failed to address it.

[13] I am mindful of the fact that the onus is on the applicant to establish that he falls within one of the enumerated grounds on the basis of both a subjective as well as an objective fear of persecution. Here, the evidence of the applicant as well as the documentary evidence before the panel should have alerted the panel to the necessity of analysing the evidence in accordance with the

framework set out in *Zolfagharkhani, supra*, to determine what the ultimate effect of the application of the law in question would be with respect to the applicant. In failing to do so, the CRDD erred in law.

[14] Accordingly, the application for judicial review is allowed and the matter is remitted back to the RPD before a differently constituted panel for redetermination. Having allowed the application for the reasons stated, it is not necessary to address the issue of the adequacy of the interpretation.

[15] Counsel suggested no question for certification. No question is certified.

« Carolyn A. Layden-Stevenson »

Judge

Ottawa, Ontario

October 18, 2002

FEDERAL COURT OF CANADA

Names of Counsel and Solicitors of Record

DOCKET: IMM-12-02

STYLE OF CAUSE: MANSOUR KASIM EL KASIM ET AL

Applicants

- and -

THE MINISTER OF CITIZENSHIP AND

IMMIGRATION

Respondent

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