

**IMM-1346-96**

**BETWEEN:**

**KADHOM ABDUL HU HAMDAN**

**(a.k.a. KADHOM ABDUL HUSSIEN HAMDAN)**

**Applicant**

**- and -**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

**REASONS FOR ORDER**

**THE ASSOCIATE CHIEF JUSTICE:**

This is an application, by way of judicial review, for an order setting aside the decision of the Convention Refugee Determination Division of the Immigration and Refugee Board which held that the applicant was not a Convention refugee. At the conclusion of the hearing in Toronto, Ontario, on February 12, 1997, I took this matter under reserve and indicated that brief reasons would follow.

The applicant, a citizen of Iraq, arrived in Canada on February 11, 1995. He indicated his intention to make a refugee claim immediately on arrival. A hearing was held before the Refugee Board on January 22, 1996.

Before coming to Canada, the applicant had resided in the Philippines since May 1986. From 1986 until 1992 he had legal status in the Philippines as a student. After the expiry of his student visa, he stayed in the Philippines illegally for approximately one year. He then tried to come to Canada with false travel documents, but was turned back in Hong Kong. He returned to the Philippines and subsequently filed a refugee claim with the United Nations High Commissioner for Refugees (UNHCR). His claim was accepted. The fact that the applicant has a well founded fear of persecution in Iraq was confirmed by the Refugee Board and was not at issue in the present application.

The Refugee Board determined that the applicant was not a Convention refugee on the basis that he was excluded from such status due to Article 1(E) of the Convention, which states:

E. This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

The reasoning of the Board, at pp. 9-10, is as follows:

For a claimant to come within the parameters of Article 1(E), he must, at a minimum, have both the right to return to, and remain in, the country in question. By his own evidence, the claimant has these rights.

In Shamlou, the Federal Court identified four criteria that this Division should look to in considering Article 1(E). These are: the right to return; the right to work; the right to study; and full access to social services.

The claimant, by his own evidence, has the first and third of these rights. The absence of a right to work is, in the particular circumstances of this claim, not particularly material, as the claimant was provided with a "monthly stipend to live in Manila" by the UNHCR. We have no evidence as to the claimant's access

to social services in the Philippines, save for his testimony that, compared to Canada, the Philippines are neither as extensive nor as generous as they are in Canada.

The underlying purpose of Article 1(E) is very clear:

It is common ground that the purpose of Article 1(E) of the Convention is to exclude from its application persons who do not need its protection...

This, of course, is perfectly consistent with the underlying purpose of Canada's Convention refugee determination system:

...the purpose of that system is to provide safe haven to those who genuinely need it, not to give a quick and convenient route to landed status for immigrants who cannot or will not obtain it in the usual way.

Is the claimant a person in genuine need of protection? We think not. He has that protection in the Philippines. He has the right to return there. He can study there. He has a monthly income there. He can travel, both internally and externally. The fact that he cannot vote in Philippine elections is, in our opinion, immaterial...[citations omitted]

The argument before me in hearing this matter focused on the application of the criteria for applying Article 1(E) indicated in *Shamlou v. Canada* (1995), 103 F.T.R. 241, 32 Imm.L.R. (2d) 135, that a person must have: (a) the right to return to the country of residence; (b) the right to work freely without restrictions; (c) the right to study; and (d) full access to social services in the country of residence. It was also claimed that there is another basic criterion, namely that a person cannot be excluded under Article 1(E) if he has a temporary status which must be renewed, and may be cancelled.

The applicant says that these criteria are basic elements, which must each be satisfied if an exclusion under Article 1(E) is to be made. The respondent says that Article 1(E) must be read in a more purposive light. The respondent says that the Article should apply to exclude a person who has already found safe haven in another country, but seeks protection in Canada notwithstanding.

Article 1(E) is incorporated into Canadian law under section 2 of the *Immigration Act*, R.S.C. 1985, c. I-2 which states, *inter alia*:

"Convention refugee"...does not include any person to whom the Convention does not apply pursuant to section E or F of Article 1 thereof, which sections are set out in the schedule to this Act;...

The primary source for understanding the meaning and application of Article 1(E), must be the text of the article itself. I repeat it here:

E. This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

It is clear from the text that the Article is intended to operate where a person has been recognized "as having the rights and obligations which are attached to the possession of the nationality" of the country in which he has taken up residence. It is not necessary to comment on whether the criteria laid out in *Shamlou* must all be satisfied for exclusion under Article 1(E), or whether other criteria may be relevant in some cases. The relevant criteria will change depending on the rights which normally accrue

to citizens in the country of residence subject to scrutiny. In this case, it would appear to be critical that the applicant has neither the right to work, nor the right to receive social services in the Philippines.

The Refugee Board has applied the wrong standard. The Refugee Board erred by considering only whether the applicant had a safe haven in the Philippines, as opposed to applying the test set out in Article 1(E), specifically whether the applicant had the rights and obligations attached to nationality of the Philippines. Accordingly, the decision is set aside and the matter referred back for rehearing by a freshly constituted panel.

O T T A W A

March 27, 1997

"James A. Jerome"

A.C.J.

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FEDERAL COURT OF CANADA

TRIAL DIVISION

NAMES OF COUNSEL AND SOLICITORS OF RECORD

COURT FILE NO.: IMM-1346-96

STYLE OF CAUSE: Kadhom Abdul Hu Hamdan (a.k.a. Kadhom Abdul Hussien Hamdan) v. M.C.I.

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: February 12, 1997

REASONS FOR ORDER BY: The Associate Chief Justice

DATED: March 27, 1997

APPEARANCES:

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Mr. John Loncar for the Respondent

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